DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

o. 84-1744-CFY
tatus: GRANTED

ocketed:
ay 6, 1985

Title: Thomas J. Henderson, Scott O. Thornton and Ruth Freedman, Petitioners
v.
United States

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Anton,Denise, Reisman,Alex, Sloan,Paul G.

Counsel for responcent: Solicitor General

ntry	Date	Note	Proceedings and Orders
1	May 6 1985	G	Petition for writ of certiorari filed.
3	Jun 6 1985		Order extending time to file response to petition until July 6, 1985.
4	Jul 8 1985		Order further extending time to file response to petition until August 5, 1985.
5	Aug 7 1985		DISTRIBUTED. September 30, 1985
6	Aug 7 1985	X	Brief of respondent United States in opposition filed.
8	Oct 7 1985		REDISTRIBUTED. October 11, 1985
9	Oct 15 1985		Petition GRANTED.
			**********
10	Nov 7 1985	G	Motion of petitioner Ruth Freedman for appointment of counsel filed.
11	Nov 7 1985	G	Motion of petitioner Ruth Freedman for leave to proceed further herein in forma pauperis filed.
12	Nov 7 1985		DISTRIBUTED. Nov. 15, 1985. (Above two motions).
13	Nov 14 1985		Record filed.
14	Nov 14 1985		Certified copy of original record and proceedings, 9 volumes, received.
15	Nov 18 1985		Motion of petitioner Ruth Freedman GRANTED.
16	Nov 18 1985		Motion for appointment of counsel GRANTED and it is ordered that Alex Reisman, Esquire, of San Francisco, California, is appointed to serve as counsel for the petitioner Ruth Freedman in this case.
17	Nov 29 1985		Joint appendix filed.
18	Nov 29 1985		Brief of petitioners Thomas J. Henderson, et al. filed.
20	Dec 23 1985		Order extending time to file brief of respondent on the merits until February 1, 1986.
21	Feb 4 1986		SET FOR ARGUMENT, Tuesday, April 1, 1986. (4th case)
22	Jan 31 1986		Order further extending time to file brief of respondent on the merits until February 10, 1986.
23	Feb 10 1986		Brief of respondent United States filed.
24	Feb 21 1986		CIRCULATED.
25	Mar 25 1986	X	Reply brief of petitioner Thomas J. Henderson, et al. filed.
26	Apr 1 1986		ARGUED.

1PP

PETITION FOR WRIT OF CERTIORARI

No. 84-1744

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON
and RUTH FREEDMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENISE ANTON
473 Jackson Street
San Francisco, CA 94111
(415) 986-5591

Counsel for Petitioner
SCOTT O. THORNTON

PAUL G. SLOAN
407 Sansome Street
San Francisco, CA 94111
(415) 788-2200

Counsel for Petitioner
THOMAS J. HENDERSON

ALEX REISMAN
861 Bryant Street
San Francisco, CA
94103
(415) 626-5134

Counsel for
Petitioner
RUTH FREEDMAN

74

QUESTIONS PRESENTED

1. Whether only such delay as is reasonably necessary for a fair processing of pretrial motions is excludable under section 3161(h)(1)(F) of the Speedy Trial Act, 18 U.S.C. §§ 3161, et seq.

2. Whether the exclusion of time for pretrial motions under section 3161 (h)(1)(F) of the Speedy Trial Act applies to delay occurring after a hearing on pretrial motions and, if so, whether it applies only to such post-hearing delay as is necessary for prompt disposition of those motions.

TOPICAL INDEX

TABLE OF AUTHORITIES

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON
and RUTH FREEDMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Thomas J. Henderson, Scott O. Thornton and Ruth Freedman, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered

in this proceeding on November 5, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 619, and a copy of the slip opinion and Judge Ferguson's dissent are attached hereto as Appendix A. The order denying the petition for rehearing is also reported at 746 F.2d 619; a copy of that order and Judge Ferguson's dissent are attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1984, affirming petitioners' convictions. The Court of Appeals denied a timely petition for rehearing en banc on March 7, 1985. This petition for certiorari is filed within 60 days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3161(h)(1)(F):

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
>
> . . .
>
> (F) Delay resulting from any pretrial

> motion, from the filing
> of the motion through
> the conclusion of the
> hearing on, or other
> prompt disposition of,
> such motion. . . .

STATEMENT OF THE CASE

The question presented herein is whether a violation of the Speedy Trial Act occurred as a result of the district court's failing, in the first instance, to schedule a hearing on pretrial motions; then, after finally holding a hearing, granting the government an open extension in which to provide additional information regarding a motion and request for an evidentiary hearing argued at the hearing; and, finally, after receiving the information from the government, failing to schedule an evidentiary hearing or otherwise dispose of the

motion for another ten months. The facts pertinent to this issue are as follows:

On October 27, 1980, an indictment was filed in the United States District Court for the Northern District of California charging petitioners with offenses involving the manufacture and possession with intent to distribute methamphetamine and phenyl-2-propanone. Petitioners were arraigned on this indictment on September 3, 1980.

On July 21, 1982, petitioner Thornton, later joined by petitioners Henderson and Freedman, moved to dismiss the indictment based on violations of the Speedy Trial Act. The principal period of delay to which petitioners objected was the period from the filing of the first pretrial motion in the case on November 3, 1980, to the filing of the district court's written ruling on

that same motion on January 19, 1982, nearly two years later. The following events occurred in the district court during this period of time:

On November 3, 1980, the defense filed a motion to suppress attacking the validity of the search warrant which led to the discovery of evidence underlying the indictment. Petitioner Henderson filed a separate motion to suppress evidence on that same date. On November 24, 1980, the defense filed a supplemental pleading attacking the veracity of allegations in the search warrant. A motion requesting disclosure of information relating to an informant was filed on behalf of all defendants on January 13, 1981.

On February 9, 1981, the government filed a response to the motions to suppress filed by petitioners. It filed

a response to petitioner Henderson's separate motion to suppress on February 17, 1981.

On March 2, 1981, petitioners filed a reply to the government's February 9, 1981 response, and two days later, on March 4, 1981, the government filed a supplemental memorandum regarding standing.

The date for hearing of pretrial motions, originally scheduled for November 12, 1980, was continued at least six times. The hearing was first continued to November 26, 1980 by stipulation at the request of the Assistant United States Attorney. On November 26, 1980, the clerk of the court notified all parties that the hearing was continued to January 14, 1981. On December 31, 1980, the clerk notified all parties that the hearing was continued to

January 28, 1981. When counsel for petitioner Freedman informed the clerk that he would be unavilable on that date, the hearing was continued to February 18, 1981. On February 18, 1981, all counsel appeared in court, and the hearing was continued to March 4, 1981. On March 4th, the clerk advised the parties that the hearing was postponed to March 25, 1981.

On March 25, 1981, the hearing was finally held. At the hearing all motions except the motion to suppress based on misrepresentations in the search warrant affidavit were either denied, submitted or deferred until trial. Before ruling on petitioners' request for an evidentiary hearing, however, the court wanted to review original telephone toll records pertinent to petitioners' allegation that the affidavit in support of the search

warrant contained false representations regarding certain telephone calls. If the toll records indicated that a telephone call had been made from a particular place at a particular time, a hearing would not be necessary. However, both petitioners and the prosecutor agreed that if the records indicated that no telephone call had been made, or if the original telephone records could not be found, a hearing would be necessary.

The prosecutor stated at the March 25th hearing that she believed she could have the records by the end of that week. The court suggested that the prosecutor submit the information in letter form to petitioners; petitioners should then advise the court whether they continued to insist upon an evidentiary hearing.

On June 25, 1981, three months after the hearing and seven months after the

motion raising the issue had been filed, the prosecutor submitted a letter to all counsel and the court purporting to explain the basis for the search warrant affidavit allegations regarding the telephone calls. In a letter dated July 6, 1981, petitioners advised the United States Attorney and the court of petitioners' position that an evidentiary hearing was still required. The court took no action.

On August 18, 1981, the government filed an affidavit confirming the representations made in its June 25th letter. Once again, the court took no action.

Nearly one month later, on September 14, 1981, petitioners, upon discovering that there may have been another misrepresentation in the search warrant affidavit, filed a new request for an evidentiary hearing. On October 23,

1981, petitioners filed another motion following their discovery that the government may have destroyed important physical evidence.

On November 10, 1981, the government filed its response to both the Spetember 14 and October 23 defense pleadings. A supplemental government response was filed on November 25, 1981. The defense replied on December 14, and the government filed a further response on December 15, 1981.

On January 19, 1982, the district court filed an order denying the motion to suppress attacking the sufficiency of the search warrant affidavit -- the motion that had been denied on the record on March 25, 1981. The court did not address any other motion.

Petitioners' motion to dismiss based on Speedy Trial Act violations was

filed on July 23, 1982, and a hearing on that motion was held on September 8, 1982. Following argument, the district court denied the motion. It ruled, inter alia, that the entire period from November 3, 1980 to December 15, 1981 was excludable pursuant to 18 U.S.C. §3161 (h)(1)(F), the exclusion for delay resulting from any pretrial motion, "from the filing of the motion through conclusion of the hearing on, or other prompt disposition of such motion. . . ."

Trial commenced on November 1, 1982 and, on December 6, 1982, all three petitioners were convicted of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, 21 U.S.C. §846; petitioners Thornton and Freedman were convicted of manfacture and possession with intent to distribute methamphetamine, 21 U.S.C.

§842(a)(1); and petitioner Henderson was convicted of two counts of traveling interstate with intent to promote the manufacture and possession of methamphetamine, 18 U.S.C. §1952(a)(3).

Petitioner Henderson filed a Notice of Appeal on March 23, 1983. Petitioner Freedman filed a Notice of Appeal on March 30, 1983 and petitioner Thornton filed a Notice of Appeal on March 31, 1983. On November 5, 1984, petitioners' convictions were affirmed by a three-judge panel of the Ninth Circuit, Judge Ferguson dissenting. The Court of Appeals ruled that all time during which pretrial motions are pending, regardless of whether such time is necessary for a fair processing of the motions, is excludable under section 3161(h)(1)(F).

On November 19, 1984, petitioners filed a petition for rehearing. That

petition was denied on March 7, 1985. Judge Ferguson filed a dissent from denial of rehearing.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW THAT ALL TIME DURING WHICH PRETRIAL MOTIONS ARE PENDING, WHETHER REASONABLE OR NOT, IS EXCLUDABLE UNDER 18 U.S.C. §3161(h)(1)(F) CONFLICTS WITH DECISIONS OF OTHER CIRCUITS OF THE COURT OF APPEALS.

The opinion below holds that a district court may, in conformity with the Speedy Trial Act, delay decision on any pretrial motion for as long as it wants and for any reason that it wants, including circumvention of the time pressures of the Speedy Trial Act. This ruling, in the words of Judge Ferguson, "sets the Speedy Trial Act on its head." (Appendix, p. A-26, infra.)

The majority's interpretation of section 3161(h)(1)(F) undermines the

very purpose of the Act and leaves the defendant and government alike with no statutory protection against bad faith delay or serious prejudice caused by such delay. Moreover, as Judge Ferguson recognized in his dissent from the denial of rehearing, such an interpretation particularly handicaps the government. With no Sixth Amendment right to a speedy trial, the government is utterly "defenseless against district court or defense instigated delays." (Appendix, p. A-38, infra.) This inflexible interpretation of section 3161(h)(1)(F) by the majority of the court below is in direct conflict with decisions of other circuits of the court of appeals.

Seven circuits other than the Ninth Circuit have considered whether section 3161(h)(1)(F) excludes only such delay as is "reasonably necessary" for a fair

processing of pretrial motions. Four circuits have ruled, without qualification, that only reasonable delay is excludable. United States v. Mitchell, 723 F.2d 1040 (5th Cir. 1983); United States v. Cobb, 697 F.2d 38 (2nd Cir. 1983); United States v. Novak, 715 F.2d 810 (3rd Cir. 1983), cert. den. sub nom Ware v. United States, ___ U.S. ____, 104 S.Ct. 1293, ____ L.Ed.2d ____ (1984); United States v. Janik, 723 F.2d 537 (7th Cir. 1983).[1/]

The court below cites cases from the Fifth, Seventh and Eighth Circuits in support of its holding. However, not one of the cases cited has adopted the inflexible position of the Ninth

---

1. Although the Fourth Circuit has not addressed the issue, a Maryland District Court has ruled that the reasonable standard should apply. United States v. Smith, 563 F.Supp. 217 (D.Md. 1983).

Circuit.

The Fifth Circuit has ruled that, while the terms of section 3161(h)(1)(F) are "all but absolute," the prompt disposition language "might be taken to imply that such matters should be promptly disposed of and that might justify, in an egregious case, disregarding some portion of the pendency." United States v. Horton, 705 F.2d 1414, 1416 (5th Cir. 1983), cert. den., ___ U.S. ____, 104 S.Ct. 496, ____ L.Ed.2d ____ (1983).

Although cases from the Eighth Circuit, United States v. Brim, 630 F.2d 1307 (8th Cir. 1980), cert. den., 452 U.S. 966, 101 S.Ct. 3121, 69 L.Ed.2d 980 (1981), and United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), cert. den., 460 U.S. 1040, 103 S.Ct. 1434, ____ L.Ed. 2d ____ (1983), and the Eleventh Circuit, United States v. Stafford, 697 F.2d 1368

(11th Cir. 1983), have characterized the exclusion of subsection (F) as "absolute", these cases did not deal with the specific issue raised herein -- unreasonable delay.

Furthermore, recent cases have indicated that the matter is far from resolved in either the Eighth or Eleventh Circuits. In United States v. Turner, 725 F.2d 1154 (8th Cir. 1984), the defendant had urged the court to "refine" its ruling in United States v. Brim and adopt the "reasonably necessary" standard. The court found that it need not reach the issue. In United States v. Campbell, 706 F.2d 1138 (11th Cir. 1983), and United States v. Mastrangelo, 733 F.2d 793 (11th Cir. 1984), the courts also ruled that under the facts of the case before them, it was unnecessary to decide whether there is a reasonableness

limitation upon the subsection (F) exclusion. These cases suggest that the law in both circuits is unsettled and in an appropriate case would be reconsidered in light of the Cobb decision.

There is a square and irreconcilable conflict between the decision below and decisions of at least four other circuits. Accordingly, petitioners submit that this court should grant certiorari to review the judgment below.

II

THE DETERMINATION OF WHAT, IF ANY, PERIOD OF DELAY FOLLOWING A HEARING ON PRETRIAL MOTIONS IS EXCLUDABLE UNDER 18 U.S.C. §3161(h)(1)(F) IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The court below ruled that in spite of the clear purpose of the Speedy Trial Act, which is to ensure a speedy trial, a literal interpretation of section

3161(h)(1)(F) compels a finding that all delay resulting from pretrial motions, whether reasonable or not, must be excluded under that subsection. Petitioners contend that it is one thing, however, to disregard the purpose of the Speedy Trial Act while purporting to adhere to the literal language of the Act; it is quite another to subvert the purpose of the Act while extending the exclusion far beyond the literal language of the statute. The court below did just that when it excluded the nearly ten months of delay following the hearing on pretrial motions held in this case.

Section 3161(h)(1)(F) excludes from Speedy Trial Act calculations delay resulting from a pretrial motion, "from the filing of the motion to the conclusion of the hearing on, or other prompt disposition of such motion." The

exclusion of section 3161(h)(1)(F) does not apply to delay occurring after a hearing on pretrial motions. Once a hearing has been held, the "under advisement" exclusion of section 3161(h)(1)(J) comes into effect, and the district court has thirty days in which to rule on the motions argued at the hearing. If, for whatever reason, the court finds that thirty days is too short a period of time in which to rule, it may grant a continuance on its own motion or on that of counsel for either party. See United States v. Janik, supra, 723 F.2d at 544. The mere fact that the court needs more time in which to rule, however, does not create an additional, unbounded body of excludable time under the auspices of subsection (F).

Even if the exclusion of section 3161(h)(1)(F) is interpreted to apply

to delay following a hearing on pretrial motions, the exclusion must be held to apply only to delay necessary to achieve a "prompt disposition" of the motions. The language of subsection (F) demands at least this much.

"Prompt disposition" has been defined as disposition within thirty days. United States v. Stafford, supra, 697 F.2d at 1373-1374. It would be difficult, however, to find that the disposition in this case, occurring ten months after the hearing date, would qualify as "prompt" under any definition of the word. The court below failed to consider the delay following the hearing, or even the fact that a hearing had occurred.

In the instant case, the majority held that the period from the filing of petitioners' first pretrial motion on November 3, 1980, through the hearing

on pretrial motions on March 25, 1981, through the submission on July 6, 1981 of all papers the court expected regarding the motions argued,[2] through the filing of a new pretrial motion on September 14, 1981,[3] all was excludable

---

2. Guidelines issued to aid courts in applying the Speedy Trial Act provide that the starting date for the under advisement exclusion is "the day following the date on which the court has received everything it expects from the parties, examining physicians, etc., before reaching a decision." Guidelines to the Administration of the Speedy Trial Act of 1979, as amended, pp. 42-43 (1981). Accord, United States v. Stafford, supra, 637 F.2d at 1373-1374.

3. Petitioners do not dispute that the new pleading filed on September 14, 1981 tolled the Speedy Trial Act and created an exclusion pursuant to section 3161(h)(1)(F). The September 14th filing, however, did not change the status of previously submitted motions. See, e.g., United States v. Janik, supra, 723 F.2d 537, wherein the Seventh Circuit held that the prompt disposition requirement of section 3161(h)(1)(F) could not be circumvented by the district court's reopening of the hearing on a motion to suppress more than thirty days after the matter had been taken under advisement.

under subsection (F). The court failed to consider any distinction between delay preceding a hearing on pretrial motions and delay following such a hearing. Indeed, the opinion suggests that pretrial motions are pending until the district court arbitrarily decides otherwise. Such an interpretation creates a gaping loophole in the Act, contrary not only to the intent of the Act, but also to the plain language of subsection (F).

The court below was justifiably concerned that the parties be able to ascertain clearly when the exclusion under section 3161(h)(1)(F) starts and stops running:

> "It is important that the court and the parties know when the clock stops running under the Act. It is even more important

> that they know when it starts again." (Appendix, p. A-12, infra.)

Section 3161(h)(1)(F) explicitly states that the clock stops running at the "conclusion of the hearing on, or other prompt disposition of" pretrial motions. Any attempt to extend subsection (F) beyond both these dates would result in the very uncertainty regarding application of subsection (F) that the court below sought to avoid.

The Ninth Circuit, in a contradictory opinion containing no analysis of this issue whatsoever, has set a dangerous precedent regarding the excludability of delay following a hearing on pretrial motions. Petitioners submit that this Court should grant certiorari in order to clarify this important issue of federal law.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

DENISE ANTON
Counsel for Petitioner
SCOTT O. THORNTON

PAUL G. SLOAN
Counsel for Petitioner
THOMAS J. HENDERSON

ALEX REISMAN
Counsel for Petitioner
RUTH FREEDMAN

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. THOMAS J. HENDERSON, SCOTT O. THORNTON and RUTH FREEDMAN, Defendants-Appellants.	Nos. 83-1075 83-1076 83-1112 (Consolidated) (D.C. No. CR-80-317-SMW) OPINION

Appeal from the United States District Court for the Northern District of California
Honorable Spencer Williams, District Judge, Presiding
Argued and Submitted January 13, 1984

Before: DUNIWAY, SKOPIL, and FERGUSON, Circuit Judges

DUNIWAY, Circuit Judge:

Henderson, Thornton, and Freedman appeal from their criminal convictions for conspiracy, manufacture, sale and possession of controlled substances (methamphetamine and phenyl-2-propanone). They argue that (1) unreasonable delays in the disposition of pretrial suppression motions violated their rights under

the Speedy Trial Act; (2) use of an electronic beeper violated their Fourth Amendment privacy rights; and (3) a search warrant affidavit did not establish probable cause. We affirm.

FACTS:

In February 1980, Henderson (under the alias "Richard Martin") ordered from Buckeye Scientific Co. of Columbus, Ohio, chemicals that could be used to produce methamphetamine and phenyl-2-propanone, which are controlled substances listed in Schedule II and prohibited by 21 U.S.C. § 841(a)(1). This order triggered Drug Enforcement Agency attention. In April, Henderson and co-defendant Bell rented a private plane, flew from California to Ohio, and accepted delivery of the chemicals at a hotel parking lot. Henderson ordered more chemicals, for June pick-up. An agent got a warrant

from a U.S. Magistrate in Columbus, authorizing installation of an electronic beeper transmitter in one of the chemical containers. Henderson drove from California to Ohio, picked up the chemicals on June 24, and headed homeward. Agents following by car and plane lost the beeper signal.

Agents had located Henderson in California, however, by a Modesto post office box used in business dealings with Buckeye. They also watched Thornton with Freedman and Bell. Agents searched for the beeper by air and, on July 15, picked up the signal from Freedman's house near Watsonville, California. They got a search warrant, raided the house on the 17th, and found the suspected drug factory.

On August 27, 1980, a Grand Jury indicted the appellants on a variety

of charges involving the manufacture and possession with intent to distribute methamphetamine and phenyl-2-propanone. On July 21, 1982, Thornton, later joined by the other appellants, moved to dismiss for violation of the Speedy Trial Act. The district court held a hearing on the motion and denied it on October 8, 1982. Thornton also filed a petition for writ of mandamus on the same grounds to this court, which denied it. Thornton v. U.S. District Court for the Northern District of California, 9 Cir., ordered filed November 8, 1982, No. 82-7624.

After a trial, a jury convicted the three defendants of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, 21 U.S.C. § 846; Thornton and Freedman of manufacture and possession with intent to distribute

methamphetamine, 21 U.S.C. §842(a)(1); and Henderson of two counts of traveling interstate with intent to promote the manufacture and possession of methamphetamine, 18 U.S.C. § 1952(a)(3). The district court severed the case of co-defendant Bell, the pilot for the April trip, who was tried separately and acquitted.

I. SPEEDY TRIAL ACT REQUIREMENTS.

The Speedy Trial Act requires that trial begin within 70 days of the latest indictment, information, or appearance. 18 U.S.C. § 3161(c)(1). All agree that the clock started on September 3, 1980, when defendant Bell was arraigned. Trial did not start until November 1, 1982, some 789 days later. After a hearing on the appellants' motion to dismiss for Speedy Trial Act violations, the district court ruled that at most 66

days of the delay (specifically, 48 days from 9/3/80 to 10/22/80, 4 days from 1/15/82 to 1/19/82, 5 days from 1/20/82 to 1/25/82, and a tentative 9 days from 1/25/82 to 2/3/82) were not excludable time and, therefore, there was no violation. (Memorandum and Order of October 8, 1982.) The appellants argue that 303 to 394 days of the delay were non-excludable and that the district court should have dismissed the indictment with prejudice under § 3162(a)(2).

The standard of review in Speedy Trial appeals is "clear error" in the district court's factual findings and de novo review of questions of correct legal standards. United States v. Nance, 9 Cir., 1982, 666 F.2d 353, 356.

A. Pretrial Motions.

The Act provides, 21 U.S.C. § 3161 (h)(1)(F):

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (i) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
> . . .
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;
> . . .
> (Emphasis ours.)

The trial judge excluded most of the time as pretrial motion delays under that section. The appellants argue that the court erred; that it could exclude only delays that were "reasonably necessary." The government points out that the statute contains no such

requirement and argues that such a requirement is undesirable.

Without expressly addressing this question, we have treated the exclusion as automatic. See, e.g., United States v. Van Brandy, 9 Cir., 1984, 726 F.2d 548, 551-52; United States v. Manfredi, 9 Cir. 1983, 722 F.2d 519, 524. Several other circuits exclude pretrial motion time automatically. See, e.g., United States v. Horton, 5 Cir., 1983, 705 F.2d 1414, 1416; United States v. Stafford, 11 Cir., 1983, 697 F.2d 1368, 1373 & n.4; United States v. Fogarty, 8 Cir., 1982, 692 F.2d 542, 545; United States v. Brim, 8 Cir., 1980, 630 F.2d 1307, 1312. Some circuits, however, have adopted a "reasonably necessary" standard. See, e.g., United States [v.] Novak, 3 Cir., 1983, 715 F.2d 810, 819-20; United States v. Cobb, 2 Cir., 1983,

697 F.2d 38, 43-44.

On its face, the statute excludes delays resulting from pretrial motions without qualification. Condensed, the language is "The following periods . . . shall be excluded . . .: Any period of delay . . . including . . . delay resulting from any pretrial motion, from the filing of the motion to the conclusion of the hearing on, or other prompt disposition of such motion." It does not say "any reasonable period of delay." The word "prompt" applies only to dispositions other than by hearing. Stafford, 697 F.2d at 1373 & n.4.

Congress knew how to require that a period of delay be reasonable when it wished to do so, see § 3161(h)(7): "Any reasonable period of delay when the defendant is joined for trial with a defendant as to whom the time for trial

has not run. . . ." We note that § 3161(h) contains paragraphs (1) through (6), every one of which except (6) begins with the words "Any period of delay," and paragraph (6) uses the same words, though not at the beginning. The difference between (7) and (1) through (6) is a strong indication that exclusion of the periods defined in (1)-(6) was intended to be automatic.

In general, the legislative history supports this view. The House Committee reported its "intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H.R. Rep. No. 390, 96th Cong., 1st Sess. 10, reprinted in 1979 U.S. Code Cong. & Ad. News 805, 814. Similarly, the Senate Committee reported that "if basic

standards for prompt consideration of pretrial motions are not developed, this provision could become a loophole which would undermine the whole Act," making this "an appropriate subject for circuit guidelines" pursuant to § 3166(f). S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). See generally Plan for Prompt Disposition of Criminal Cases, United States District Court for the Northern District of California, part II § 6, West's Calif. Rules of Court 669, 671 (1984). Congress did not indicate that § 3161(h)(1)(F) itself required or ensured prompt or otherwise time-constrained hearing of pretrial motions.

The Senate Committee repeatedly referred to the § 3161(h)(1)(F) exclusion as "automatic," S. Rep., supra, at 33, 34, and the courts in Horton, Stafford, Fogarty, and Brim, all supra,

also read the statute this way. See, e.g., Stafford, 697 F.2d at 1373 & n.4.

The Senate Committee, however, noted that it did not "intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary." S. Rep., supra, at 34. The courts in Novak, 715 F.2d at 819-20, and Cobb, 697 F.2d at 43-44, relied on this expression of legislative intent to hold that § 3161(h)(1)(F) excludes only the time "reasonably necessary for the disposition of pretrial motions.

We do not agree. It is important that the court and the parties know when the clock stops running under the Act. It is even more important that they know when it starts again. But if the start is to be at the point when the passage

of time becomes "unreasonable," even if the period of delay mentioned in the statute has not expired, neither the court nor the parties can know where they stand. Moreover, there are many cases, such as the one before us, in which the outcome of the defendants' pretrial motions may effectively dispose of the outcome at trial. Defendants are entitled to the opportunity to explore a variety of attacks using the pretrial motion process, and to thoughtful consideration of these issues. The language of § 3161(h)(1)(F) does not show that Congress intended to restrict this process, and we decline to write conditions into the provision that would pressure trial courts to give short shrift to pretrial litigation, under the threat of dismissal of criminal indictments.

We are aware that in Van Brandy, 726 F.2d at 551, we quoted the following language from the Second Circuit's opinion in Cobb (697 F.2d at 46):

> We accept, instead, the government's view that a pretrial motion triggers an automatic exclusion, with the qualification, however, that the amount of time eligible for exclusion may not be extended by postponing the hearing date or other disposition of the motion beyond what is reasonably necessary for processing the motion.

726 F.2d at 551. The portion of that language regarding "postponing the hearing date . . . beyond what is reasonably necessary" is dictum, as is shown by what we said next:

> There is no suggestion here that the hearing date, continued with the consent of all parties, was unreasonably delayed.

Id. We also note that we next cited with approval Stafford and Brim, supra,

both of which exclude the time of pendency of pretrial motions automatically. We decline to read § 3161(h) as if it said "any reasonable period of delay" instead of "any period of delay," or to read § 3161(h)(1)(F) as if it said "reasonable delay resulting from any pretrial motion" instead of "delay resulting from any pretrial motion."

The district court correctly excluded all of the time during which pretrial motions were pending.

B. Continuances.

Section 3161(h)(8)(A) excludes "Any period of delay resulting from a continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." It also requires that the judge set forth his reasons in the

record. It does not, however, require that this be contemporaneous, and we have recognized that the trial court has two opportunities to make the required record: when granting the continuance and when reviewing a Speedy Trial claim. United States v. Bryant, 9 Cir., 1984, 726 F.2d 510, 511; United States v. Perez-Reveles, 9 Cir., 1983, 715 F.2d 1348, 1352. Accord United States v. Edwards, D.C. Cir., 1980, 627 F.2d 460, 461. Cf. United States v. Frey, 9 Cir., 1984, 735 F.2d 350, 353, which notes that careful contemporaneous consideration is sufficient even though the findings are recorded later. The legislative history specifies that trial courts may grant excludable continuances to allow defense counsel to prepare motions. H.R. Rep. No. 390, supra at 12, reprint at 816; S. Rep., supra, at 33-34.

That was the reason for one of the continuances here.

The judge stated his reasons for the continuances in his Memorandum and Order Denying Motion to Dismiss. They are the kinds of reasons listed in subparagraph (B)(ii) and (iv) of § 3161(h)(8), and we find them sufficient to justify his conclusion that the times involved in the continuances were excludable.

II. FOURTH AMENDMENT CHALLENGE TO USE OF ELECTRONIC BEEPER.

The appellants contend that the use of an electronic beeper to locate the container of non-contraband chemicals at the Watsonville house violated their right to privacy under the Fourth Amendment. The district court, they argue, should have stricken the beeper-supplied information from the search warrant

affidavit for the July 17 raid.

The agents installed and monitored the beeper pursuant to the order of a U.S. Magistrate in Ohio. The district court rejected the appellants' pretrial attacks on this order. It did not rely on the validity of the order, but on the rule in this circuit that beeper monitoring is not a search and requires no warrant. See United States v. Taylor, 9 Cir., 1983, 716 F.2d 701, 706; United States v. Brock, 9 Cir., 1982, 667 F.2d 1311, 1321-22; see also United States v. Hufford, 9 Cir., 1976, 539 F.2d 32, 34. However, the Supreme Court has recently decided that tracing a beeper signal to a place where there is a reasonable expectation of privacy, such as a home, is a search and requires a warrant. United States v. Karo, 1984, ____ U.S. at ____, slip op. at 13;

Rawlings v. Kentucky, 1980, 448 U.S. 98, 104-06.

We note second that the magistrate's order may have been a valid warrant under Karo. The supporting affidavit described the object into which the beeper was to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance was requested. See United States v. Karo, ____ U.S. at ____, slip op. at 12. The district court did not consider the validity of the order because, at that time, warrantless monitoring was permitted. We, too, need not determine the validity of the order as a warrant under Karo, because it is not decisive in this instance.

Whether courts should apply new rules in criminal cases retroactively depends on "(a) the purpose to be served

by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 1967, 388 U.S. 293, 297; see Solem v. Stumes, 1984, ___ U.S. ____, ____ (February 29, 1984, slip op. at 4-5). The first factor depends on whether the new constitutional principle is designed to enhance fact-finding at trial. Solem, ___ U.S. at ____, slip op. at 5. The purpose of warrant requirements is to protect Fourth Amendment privacy rights. The application of the exclusionary rule in Fourth Amendment context is "entirely unrelated to the accuracy of the final result." Ibid.; see United States v. Leon, 1984, ___ U.S. ____, ____ (July 5, 1984, slip op. at 7-8). The second

factor depends on whether law enforcement authorities justifiably relied on a prior rule of law that is different from that announced by the decision whose retroactivity is at issue. Solem, ___ U.S. at ____, slip op. at 7. Here, controlling Ninth Circuit authority clearly did not require a warrant to monitor a beeper transmission from a private home. Third, retroactive application of Karo would have a disruptive effect on the administration of justice. See Solem, ___ U.S. at ____, slip op. at 11. It would require reassessment of the validity of pre-Karo search warrants based, in some part, on information from warrantless monitoring of beepers in private places.

Moreover, even if the appellants all had standing, even if the beeper order were found invalid, even if Karo's

warrant requirement should apply retroactively, and even if the search warrant affidavit were insufficient without the beeper information, the outcome is controlled by the Supreme Court's recent decision that the exclusionary rule does not apply to the fruits of searches made in reasonable, good faith reliance on the validity of defective search warrants. United States v. Leon, supra. Here, the search warrant was based on a probable cause determination that comported fully with applicable legal standards at that time. Therefore, the agents reasonably relied on that warrant when they searched the Watsonville house and discovered the controverted evidence. The agents obtained the warrant in good faith, and they acted within its scope.

///

///

III. SUFFICIENCY OF THE SEARCH WARRANT AFFIDAVIT.

The appellants contend that the July 17, 1980 search warrant did not establish probable cause to believe that controlled substances and other drug laboratory indicia were at the Watsonville house.

In this case, the affidavit is sufficient to establish probable cause; the stated facts support the magistrate's conclusion that there was probable cause to believe that the evidence would be found in the stated location. See United States v. Taylor, 716 F.2d at 705-06; United States v. Hendershot, 9 Cir., 1980, 614 F.2d 648, 654; United States v. Martinez, 9 Cir. 1978, 588 F.2d 1227, 1234.

United States v. Taylor is closely in point. There, the affidavit described:

(1) the suspect's history of involvement with drug manufacture; (2) suspicious transactions with a chemical supply store and an expert chemist's opinion that the particular chemicals bought were precursors for illegal drugs, which, as here, served as the basis of a warrant to install and track and electronic beeper; and (3) information about tracking the beeper to the place for which the search warrant was sought. The affidavit was held to establish probable cause to believe that the agents would find evidence of drug-related activity. 716 F.2d at 706. The affidavit here is at least as persuasive as the Taylor affidavit. We hold that it established probable cause for a warrant to search the Watsonville property.

Furthermore, the fruits of the Watsonville search would be admissible

even if a court later found that the affidavit was not sufficient to establish probable cause, if the agents acted in reasonable, good faith reliance on the warrant. See United States v. Leon, supra.

Affirmed.

United States v. Henderson -

Nos. 83-1075/1076/1112

FERGUSON, Circuit Judge, dissenting:

I dissent. The majority holds today that any period of delay created by the pendency of a pretrial motion, whether reasonable in length or not, is excludable time under section 3161 (h)(1)(F) of the Speedy Trial Act. 18 U.S.C. §§ 3161 et seq. I disagree. The majority opinion sets the Speedy Trial Act on its head and will allow trial judges to delay ruling on pretrial motions indefinitely.

In holding that even unreasonable delay is excludable time under section 3161(h)(1)(F), the majority relies primarily on the face of the statute and notes that "Congress knew how to require that a period of delay be reasonable

when it wished to do so." Maj. op. at 5 [A-9]. In Heckler v. Edwards, ___ U.S. ____, 104 S.Ct. 1532, 1538 (1984), however, the Supreme Court instructed that we are not to give surface literal meaning to a statutory provision when that interpretation is not consistent with the "sense of the thing." The "sense" of the Speedy Trial Act is to insure defendants a speedy trial.

I agree with Judge Keeton in United States v. Hawker, 552 F.Supp. 117 (D. Mass. 1982):

> If applied literally, § 5(b)(1)(F) [of the Final Plan for Prompt Disposition of Criminal Justice within the District of Massachusetts] would exclude all time between filing and conclusion of hearing on any pretrial motion, without regard for how long the period might be and even if hearing had been intentionally deferred to avoid pressures of the speedy trial

> requirement. Such an interpretation of the Plan would cause it to be in noncompliance both with the manifest objective of the Speedy Trial Act and with the text of 18 U.S.C. § 3161(h)(1)(F), referring to "prompt disposition." I conclude that § 5(b)(1)(F) of the Plan is subject to a qualification, not stated explicitly anywhere in the text but plainly implicit in the sense of the entire Plan, that the period of excludable delay under this provision shall not be longer than is consistent with a reasonably prompt hearing.

Id. at 124-25 (footnote omitted) (emphasis added).

The majority adopts what it calls the "automatic" exclusion rule of other circuits. The cases cited by the majority, however, do not hold that unreasonable pretrial delay is automatically excludable. Indeed, one of the cases cited by the majority, United States

v. Horton, 705 F.2d 1414 (5th Cir.), cert. denied, ___ U.S. ____, 104 S.Ct. 496 (1983), specifically notes that an unreasonable delay might justify deviating from the automatic exclusion rule:

> It is true that there follows a reference to "other prompt disposition" of the motion, one that might be taken to imply that such matters should be promptly disposed of and that might justify, in an egregious case, disregarding some portion of the pendency period. Such a case might be presented by repeated unsuccessful requests for hearings or by other credible indication that a hearing had been deliberately refused with intent to evade the sanctions of the Act. Nothing of the sort is evident here.

Id. at 1416. And in United States v. Campbell, 706 F.2d 1138 (11th Cir. 1983), the Eleventh Circuit backed away from the seemingly absolute exclusion language it used in United States v. Stafford,

697 F.2d 1368 (11th Cir. 1983):

> In United States v. Cobb, 697 F.2d 38, 43-46 (2d Cir. 1982), the Second Circuit superimposed a "reasonableness" limitation upon the open-ended exclusion for pretrial motions resulting in hearings.... Because we find the delay from April 3 to May 11 was under the circumstances of this case reasonable, we need not decide whether, as the Cobb court suggests, exclusion might sometimes be inappropriate if the delay before the hearing is held unreasonable.

706 F.2d at 1143 n.12. Similarly, neither of the two cases from the Eighth Circuit, United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), cert. denied, ___ U.S. ____, 103 S.Ct. 1434 (1983) (61-day delay pending pretrial motions), nor United States v. Brim, 630 F.2d 1307 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981) (57-day delay pending pretrial motions), address a claim that

delay from a pretrial motion should have been excluded because the delay was unreasonable.

Thus, the majority becomes the first court actually confronted with the issue to reject a reasonableness limitation for section 3161(h)(1)(F). In so doing, the majority dismisses the holding of the Second and Third Circuits in United States v. Novak, 715 F.2d 810, 820 (3rd Cir. 1983), cert. denied, ___ U.S. ____, 104 S.Ct. 1293 (1984), and United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1983), as well as our language in United States v. Van Brandy, 726 F.2d 548, 551 (9th Cir. 1984). See also United States v. Janik, 723 F.2d 537, 543 (7th Cir. 1983) ("[T]he phrase 'other prompt disposition' implies that the court may not delay a criminal trial indefinitely by deferring a hearing on a pretrial motion

indefinitely. The government does not, and could not, contend otherwise.").

I believe that the "reasonably necessary" approach adopted by the Second and Third Circuits and approved by this circuit in Van Brandy is correct and is compelled by the legislative history of the Act.

Congress recognized that section 3161(h)(1)(F) could become the exception to the Speedy Trial Act that swallowed the rule. The Senate Committee warned that "if basic standards for prompt consideration of pretrial motions are not developed, this provision could become a loophole which could undermine the whole Act." S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). The Senate Committee went on to state it did not "intend that additional time be made eligible for exclusion by postponing

the hearing date or other disposition of the motions beyond what is reasonably necessary." Id. (emphasis added). This language clearly indicates that, contrary to the majority's interpretation, the "prompt disposition" language of section 3161(h)(1)(F) was intended to impose a reasonableness limitation both on time excluded pending dispositions by hearing and that excluded pending dispositions other than by hearing.

The majority today opens the door for trial courts to circumvent the constraints of the Speedy Trial Act by any number of unreasonable pretrial delays. It does so by ignoring the legislative history of the Speedy Trial Act and the well-reasoned opinions of every other circuit that has directly addressed the issue. While I sympathize with the majority's search for a per se rule,

see maj. op. at 7 [A-12-13], I cannot agree that the desire for an "easy" rule can justify the abrogation of the major purpose of the Speedy Trial Act--to insure the defendant a speedy trial. I would reverse.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. THOMAS J. HENDERSON, SCOTT O. THRONTON, and RUTH FREEDMAN, Defendants-Appellants.	)	Nos. 83-1075 83-1076 83-1112
	)	ORDER

Before: DUNIWAY, SKOPIL, and FERGUSON, Circuit Judges

The petition for a rehearing is denied. Judge Ferguson votes to grant the petition for a rehearing, and files a dissent from denial of a rehearing.

The petition for a rehearing and suggestion of a rehearing in banc has been delivered to each of the active judges of this court. No active judge

has called for a vote on the suggestion of a rehearing in banc. The suggestion of a rehearing in banc is rejected.

This order, and Judge Ferguson's dissent, are to be published.

United States v. Henderson, et al.,

Nos. 83-1075, 83-1076, 83-1112

FERGUSON, Circuit Judge, dissenting:

I dissent from the denial of the petition for rehearing in this case.

The opinion holds that trial courts may circumvent the constraints of the Speedy Trial Act by any number of unreasonable delays. Even more surprising, the government not only concedes -- but argues vigorously in its brief -- that district court judges, since the passage of the Act, have the right to delay any hearing or decision on any pretrial motion, for as long as they want, for whatever reason they want. Calendar congestion; indecision; a lost file; or no reason at all, each suffices to postpone decisions indefinitely. Any excuse, in fact, leaves the government with no means of pursuing a prosecution.

That is exactly what happened to the government in this case. Defendants filed their first pretrial motion on November 3, 1980. The court finally held a hearing on that motion on March 25, 1981. The court, however, failed to make up its mind until ten months later. The court's ruling was finally filed on January 19, 1982.

The government's concession that this delay does not, under any circumstances, violate the Speedy Trial Act, leaves prosecutors defenseless against district court or defense instigated delays. It forecloses the government from seeking a writ of mandamus to compel a district court judge to decide a pretrial motion, to set a trial date, or to do anything else listed in the excludable time provisions of the Speedy Trial Act. 18 U.S.C. § 3161(h).

The defendant, of course, retains his or her rights under the Sixth Amendment, including the right to a speedy trial. U.S. Const. amend. VI. By its own hand, however, the government divests itself of its own right to pursue timely and vigorously its own prosecutions.

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON
and RUTH FREEDMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

I, DENISE ANTON, being duly deposed, swear on my oath as follows:

That on this _____ day of May, 1985, I served the within Petition for Writ of Certiorari on the counsel for

respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

SOLICITOR GENERAL OF
THE UNITED STATES
Department of Justice
Washington, D.C. 20530

and depositing the same in the United States mail at San Francisco, California, on May _____, 1985, and further that all parties required to be served have been served.

_____
DENISE ANTON
Counsel for Petitioner
SCOTT O. THORNTON

SUBSCRIBED AND SWORN TO
BEFORE ME, A NOTARY PUBLIC,
ON THIS _____ DAY OF MAY,
1985, IN THE CITY AND COUNTY
OF SAN FRANCISCO, CALIFORNIA.

_____

OPPOSITION

BRIEF

No. 84-1744

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS J. HENDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below properly excluded delay attributable to petitioners' suppression motions in calculating time limits under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1744

THOMAS J. HENDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 746 F.2d 619. The order of the district court denying petitioners' Speedy Trial Act motion is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1984. A petition for rehearing was denied on March 7, 1985. The petition for a writ of certiorari was filed on May 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, in violation of 21 U.S.C. 846. Petitioners Thornton

and Freedman also were convicted on one count charging the manufacture and possession with intent to distribute of methamphetamine, in violation of 21 U.S.C. 841(a)(1); petitioner Henderson also was convicted of traveling in interstate commerce with intent to promote the manufacture and possession of methamphetamine, in violation of 18 U.S.C. 1952(a)(3). Henderson was sentenced to concurrent terms of four years' imprisonment on each count and fined $2000 on the conspiracy count. Freedman was sentenced to concurrent terms of three years' imprisonment on each count, to be followed by a special parole term of two years on the substantive count. Thornton was sentenced to consecutive terms of 10 years' imprisonment on the conspiracy count and five years' imprisonment on the substantive count, to be followed by a 20-year special parole term. He also was fined $30,000 on each count. The court of appeals affirmed (Pet. App. A1-A34).

1. The evidence at trial showed that petitioners Thornton and Freedman operated a laboratory for the manufacture of methamphetamine and phenyl-2-propanone at their home in Watsonville, California. Petitioner Henderson purchased chemicals for the laboratory in Ohio. Prior to one such purchase federal agents placed an electronic beeper in the container of chemicals; the agents ultimately traced the beeper to the Watsonville home. The following day the agents searched the home pursuant to a warrant and discovered the laboratory. Pet. App. A2-A3.

2. A superseding indictment against petitioners and a co-defendant was returned on September 3, 1980. On November 3, 1980, petitioners filed two pre-trial motions (one joint motion and one on behalf of petitioner Henderson) seeking the suppression of material seized from the Watsonville laboratory and other evidence. A hearing on these motions was scheduled for November 26, 1980. On November 24, 1980, however, petitioners filed a supplemental memorandum in support of their suppression motions.

The court accordingly twice rescheduled the hearing on the suppression request, first to January 14 and then to January 28, 1981. 10/8/82 Order 5-6.

Twenty days before the scheduled hearing, on January 8, 1981, Freedman's attorney informed the court that he would be unavailable on the hearing date and requested a continuance to February 18, 1981. Shortly afterwards, petitioners filed a motion to reveal the identity of an informant quoted in the warrant affidavit. The court responded to these developments by rescheduling the hearing on the outstanding motions to February 18, 1981. Prior to that date the government filed its responses to the suppression motions and to the motion to reveal the informant's identity, while petitioners' co-defendant sought to join in their suppression claims. 10/8/82 Order 6.

The parties appeared in court as scheduled on February 18, 1981. Petitioners, however, sought a further postponement, seeking additional time to reply to the government's responses. The district court granted their request, and the case was continued to March 2, 1981. On that date petitioners filed their reply. Two days later the government filed a supplemental response. Upon receipt of all the pleadings the court scheduled a hearing for March 25, 1981, and the motions were argued on that date.[1] 10/8/82 Order 6-7.

---

[1]Following the hearing, the district court entered a finding on the docket sheet indicating that the period between November 3, 1980 and March 25, 1981, was to be treated as "excludable time" under the Speedy Trial Act's pretrial motion provision. 18 U.S.C. 3161(h)(1)(F). Although by local rule petitioners had five days within which to object to the finding of excludability (see U.S. District Court, Northern District of California, *Plan for Prompt Disposition of Criminal Cases*, § II.6(b)(2)(i) at 11 (Apr. 7, 1980)), they did not file an objection.

At the hearing on March 25, 1981, the district court was presented with seven discrete Fourth Amendment issues that had been addressed in the pleadings.[2] In addition, petitioners contended at the hearing that an affidavit supporting the search warrant for the laboratory contained a factual misrepresentation regarding telephone toll records (3/25/81 Tr. 35-40), and that the case should be dismissed because of outrageous government conduct (*id.* at 2, 5-6). Petitioners did not present any evidence in support of these claims at the hearing, however, agreeing instead that further investigation would have to be undertaken (*id.* at 5-6, 40-41). And petitioner Thornton's attorney, after advising the court that he was about to begin a three-month trial, requested that further proceedings in this case be postponed pending completion of the trial (*id.* at 46). In light of these developments, it was "apparent" to the district court that "before a final decision on the suppression motion could be made, additional information about telephone calls which were part of the basis of the search warrant affidavit[] had to be obtained" (10/8/82 Order 7).

In June 1981 the government supplied the court and defense counsel with information concerning the controversial telephone toll records (10/8/82 Order 7-8). Defense counsel responded the following month by challenging the data supplied by the government and advancing additional claims of misrepresentation in the search warrant affidavit (*id.* at 8). Additional material regarding the toll records,

---

[2]Those issues were: whether the agents had probable cause to search the Watsonville laboratory; whether the agents had probable cause to search Henderson's home; whether Henderson's post-arrest statements should be suppressed; whether the agents monitored the beeper signals in violation of the Fourth Amendment; whether Henderson and a co-defendant had standing to challenge the search of the Watsonville laboratory; whether the identity of a government informant referred to in a search warrant affidavit should be revealed; and whether a co-defendant could join in petitioners' suppression claims.

including several legal memoranda and affidavits, were filed by both sides in August, September and November 1981 (*id.* at 8-9). Meanwhile, on October 23, 1981, petitioners filed another memorandum in support of their suppression motions, raising a new point: that destruction of the barrel of chemicals in which the beeper had been hidden denied them due process (*id.* at 9). The government responded to this motion in November 1981. Petitioners filed a final memorandum of law on December 12, 1981; the government filed its response three days later. On that date — December 15, 1981 — the district court took all of the suppression motions under advisement. *Id.* at 9. It denied the motions 35 days later, on January 19, 1982.[3]

3. On July 23, 1982, petitioners moved to dismiss the indictment on speedy trial grounds, challenging the excludability of the period after the filing of their first suppression motion on November 3, 1980. The district court denied this motion, explaining that "the bulk of the continuances granted * * * were due to (1) the complexity of the issues presented in the case and difficulties in securing and assimilating crucial evidence; (2) resolution of numerous pretrial motions; and (3) numerous scheduling conflicts among the various counsel involved." 10/8/82 Order 3.

---

[3]On January 25, 1982, the government moved the district court to set the case for trial. At a status hearing on February 3, 1982, however, petitioners' counsel informed the court that they intended to file a motion for reconsideration on the suppression issues. With the consent of all counsel, the court accordingly continued the case until April 21, 1982. Petitioners filed their motion for reconsideration on March 23, 1982; after an evidentiary hearing on May 10, 1982, the court denied the renewed motion. The court also set a trial date of September 13, 1982, noting that the delay was necessitated by difficulties in "coordinat[ing] the schedules of five defense attorneys and the attorney for the government." 10/8/82 Order 10-12.

The court explained that the "speedy trial clock" began running on September 3, 1980, when the superseding indictment was returned (10/8/82 Order 3). But the court found that the period from November 3, 1980, when petitioners filed the first of their suppression motions, through March 25, 1981, when a hearing on the motions was held, "is automatically excludable under [18 U.S.C.] § 3161(h)(1)(F)" (10/8/82 Order 7), which provides that a trial court "shall" exclude for speedy trial purposes "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."[4] The court added that "March 25 cannot be considered the point at which these matters were finally placed before the court for decision," given "the court's anticipation of the filing of additional materials" (*ibid.*); instead, "[i]n light of the fact that the last relevant filing was not received until December 15, 1981," the court found that "the motions were not submitted to the court" until that date (*id.* at 9). The court excluded the next 30 days, through January 15, 1982, as a period during which the motions were "under advisement." 18 U.S.C. 3161(h)(1)(J). While the clock then began running again, the court reasoned that it stopped on January 25, 1982, when the government filed a motion for a trial date; the court found that the time from that date through the trial date also was excludable.[5] In all, the court

[4]The court also explained that the period from October 22, 1980 through November 12, 1980, was excludable because covered by a continuance.

[5]The court found the period between January 25 and May 10, 1982 — when a trial date was set — to be excludable on alternative grounds:- because the government's motion to set a trial date was pending during that period, and because the "time for setting the date was put off due to the representations of defense counsel that they wanted time to file a motion to reconsider." Finally, the court found the period between May 10, 1982 and the trial date to be excludabie because the delay followed from "[t]he unavailability of various defense counsel." 10/8/82 Order 10-12.

found that no more than 66 days of non-excludable time had elapsed. 10/8/82 Order 10-12. Because the Act requires dismissal only if more than 70 non-excludable days have elapsed between arraignment or indictment and trial, the district court denied petitioners' motion.

4. The court of appeals rejected petitioners' challenge to the district court's speedy trial ruling, relying in relevant part on 18 U.S.C. 3161(h)(1)(F). In particular, the court of appeals declined petitioners' invitation (see Pet. App. A7) to read a "reasonable necessity" limitation into Section 3161(h)(1)(F).

The court explained that the statute in terms "excludes delays resulting from pretrial motions without qualification" (Pet App. A9), and it declined "to read § 3161(h)(1)(F) as if it said 'reasonable delay resulting from any pretrial motion' instead of 'delay resulting from any pretrial motion' " (Pet. App. A15). Indeed, the court noted that Congress expressly made the excludability of *other* delays turn on reasonableness, while indicating that abuse of the pretrial motion exclusion should be curbed through local guidelines (*id.* at A10-A11). And the court found that a reasonable necessity limitation would lack the precision that is needed for the Act to function: "[i]t is important that the court and the parties know when the clock stops running under the Act" (*id.* at A12). The court of appeals accordingly refused to "write conditions into the provision that would pressure trial courts to give short shrift to pretrial litigation, under the threat of dismissal of criminal indictments" (*id.* at A13).[6]

[6]Judge Ferguson dissented (Pet. App. A26-A34), maintaining that "[t]he majority opinion sets the Speedy Trial Act on its head and will allow trial judges to delay ruling on pretrial motions indefinitely" (*id.* at A26). He found support for his view in the decisions of other circuits (see *id.* at A29-A32) and in the Act's legislative history (*id.* at A32-A33).

ARGUMENT

In this Court, petitioners focus their attention on the period from November 3, 1980, through January 19, 1982, during which their pretrial motions were outstanding (Pet. 5-6). They challenge the decisions of both courts below that this period was excludable under 18 U.S.C. 3161(h)(1)(F) as "delay resulting from any pretrial motion." And they invite this Court to resolve a conflict among the circuits on whether the length of the exclusion described in Section 3161(h)(1)(F) should be subject to an implicit "reasonable necessity" limitation.

The issues presented by petitioners, however, do not warrant review. The court below was correct in concluding that nothing in Section 3161(h)(1)(F) makes the pretrial motion exclusion turn on a necessity inquiry; and any disagreement among the lower courts on the issue need not be resolved by this Court, because Congress specifically envisioned that the circuits would adopt their own guidelines relating to the administration of the Act. In any event, the one point that emerges plainly from the confusing welter of filings and counter-filings in the district court is that all of the time taken to dispose of the motions here was "reasonably necessary," making this case an inappropriate one in which to address the propriety of a reasonable necessity limitation. Indeed, petitioners' reasonable necessity claim is not squarely presented here, because petitioners filed not one but a series of pretrial motions — each of which triggered a new pretrial exclusion under Section 3161(h)(1)(F).

1. As the court of appeals explained, the Speedy Trial Act imposes no limits on the length of the pretrial motion exclusion. Section 3161(h)(1)(F) (emphasis added) on its face excludes "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through

the conclusion of the hearing on, or other prompt disposition of, such motion." [7] In terms, this language requires that the entire period from the filing of a motion through the date of the hearing on the motion (or the date on which the court otherwise takes the motion under advisement) must be excluded under the Act. The provision thus stands in sharp contrast to other sections of the Act (*e.g.*, 18 U.S.C. 3161(h)(7)), which expressly condition excludability on the "reasonable[ness]" of the period of delay.

That Congress meant the language of Section 3161(h)(1)(F) to be taken at face value is demonstrated by the Act's legislative history. As originally enacted, the pretrial motion exclusion reached only "delay resulting from hearings on pretrial motions." 18 U.S.C. (1976 ed.) 3161(h)(1)(E). Congress concluded that this provision was too narrow, however, and in 1979 it put the exclusion in its current form. In doing so, Congress plainly was aware that the exclusion's unrestricted language "could become a loophole which would undermine the whole Act" (S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979)) and could be "abus[ed]." H.R. Rep. 96-390, 96th Cong., 1st Sess. 10 (1979). But Congress did not respond to this potential problem by adding a reasonable necessity limitation to the statute; instead, it indicated that the broad, "automatic" (S. Rep. 96-212, *supra*, at 33, 34) statutory exclusion was "adopted with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H.R. Rep. 96-390, *supra*, at 10. Accord, S. Rep. 96-212, *supra*, at 34. In short, petitioners seek to read into the provision a limitation that Congress chose not to place there.

---

[7] The "other prompt disposition" language "provide[s] a point at which time will cease to be excluded, *where motions are decided on the papers without a hearing*." S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979) (emphasis added).

2. a. Despite the clarity of the statutory language, several courts of appeals have read a reasonable necessity limitation into Section 3161(h)(1)(F), holding that "the period of allowable excludable delay applicable to a pretrial motion begins automatically with the making of the motion and runs for a period of time that is 'reasonably necessary' to conclude a hearing." *United States* v. *Cobb*, 697 F.2d 38, 44 (2d Cir. 1982). Other circuits have declined to read such a limitation into the statute.[8] But this is not a matter on which uniformity is necessary. The question in this case involves only the manner in which the statutory policy will be implemented, and does not implicate whether the constitutional or other fundamental or substantive rights of criminal defendants will be observed, or bear in any way on the integrity of the judicial process. It relates most directly, instead, to the scheduling and calendaring processes of the courts.

As noted above, Congress explicitly encouraged the use of circuit and district guidelines "relating to motions practice" to prevent excessive delays in the scheduling and disposition of hearings. H.R. Rep. 96-390, *supra*, at 10; S. Rep.

---

[8]Four courts of appeals appear to have accepted a reasonable necessity limitation. See *United States* v. *Simmons*, No. 84-1445 (2d Cir. May 31, 1985), slip op. 4268-4270; *United States* v. *Mitchell*, 723 F.2d 1040, 1047-1048 (1st Cir. 1983); *United States* v. *Janik*, 723 F.2d 537, 544 (7th Cir. 1983); *United States* v. *Novak*, 715 F.2d 810, 820 (3d Cir. 1983), cert. denied, No. 83-5650 (Feb. 21, 1984). Two other courts of appeals, in addition to the court below, have rejected a reasonable necessity limitation. See *United States* v. *Mastrangelo*, 733 F.2d 793, 796 n.2 (11th Cir. 1984); *United States* v. *Stafford*, 697 F.2d 1368, 1373 & n.4 (11th Cir. 1983); *United States* v. *Horton*, 705 F.2d 1414, 1416 (5th Cir. 1983), cert. denied, No. 83-5259 (Nov. 28, 1983) (pretrial motion exclusion is automatic in all but the most extraordinary cases). One other court of appeals has termed the pretrial motion exclusion automatic, see *United States* v. *Brim*, 630 F.2d 1307, 1312 (8th Cir. 1980), although it has not directly addressed the validity of a reasonable necessity exception. See *United States* v. *Turner*, 725 F.2d 1154, 1160 (8th Cir. 1984).

96-212, *supra*, at 34. Congress itself thus envisioned that the circuits and districts would adopt varying timetables regulating the processing of motions, a development that inevitably would lead to variations in the length of the permissible pretrial motion exclusion. The use of different Section 3161(h)(1)(F) standards in different circuits therefore is not a development that, in itself, necessitates review by this Court. So long as the trial court and the parties are aware of the controlling rules and thus "know when the clock stops running" and "when it starts again" (Pet. App. A12), the precise extent of the pretrial exclusion is relatively unimportant.

b. Even if the Court believes that the "reasonable necessity" question otherwise would warrant consideration, however, this case is not an appropriate one in which to address the issue. This is not a case in which petitioners are able to point to "repeated unsuccessful requests for hearings" or "other credible indication[s] that a hearing had been deliberately refused with intent to evade the sanctions of the Act" (*United States* v. *Horton*, 705 F.2d 1414, 1416 (5th Cir. 1983), cert. denied, No. 83-5259 (Nov. 28, 1983)), or in which petitioners' motions languished "in limbo" because the district court was negligent or dilatory. *United States* v. *Janik*, 723 F.2d 537, 543 (7th Cir. 1983). To the contrary, this is a "complex and multidefendant case[]" (*United States* v. *Mitchell*, 723 F.2d 1040, 1048 (1st Cir. 1983)), in which the pretrial motions were "numerous and complex" (*United States* v. *Novak*, 715 F.2d 810, 820-821 (3d Cir. 1983), cert. denied, No. 83-5650 (Feb. 21, 1984)) and in which defense counsel were unavailable for significant periods. See *Mitchell*, 723 F.2d at 1048. On this record, there is every reason to believe that any court — even the courts that have recognized a reasonable necessity limitation — would have excluded the period of delay between November 3, 1980 and January 19, 1982, as necessary for the "complet[ion of] the submission of the matter to the

court." *Cobb*, 697 F.2d at 44. See, *e.g.*, *Mitchell*, 723 F.2d at 1048; *Novak*, 715 F.2d at 820-821.

Petitioners seem to suggest (Pet. 4-6) that they presented one motion (or one set of motions) to the court on November 3, 1980, and that the court declined to decide those motions for more than a year. That impression, however, does not reflect the confusing record in this case. In the approximately four months between November 3, 1980, when the first pleadings were filed, and March 25, 1981, when a hearing was held, petitioners and their co-defendant filed seven separate pleadings presenting four discrete motions.[9] The government filed four responsive pleadings.[10] Defense counsel also sought two significant postponements during this period. In these circumstances — where petitioners' counsel took no steps to advance the hearing date (cf. *United States* v. *Snyder*, 707 F.2d 139, 142-143 (5th Cir. 1983)) and in fact were unavailable or unprepared on the scheduled hearing dates (cf. *Mitchell*, 723 F.2d at 1048), and where petitioners advanced several complex motions in seriatim fashion — the delay in holding a hearing hardly can be termed unreasonable. Indeed, petitioners did not object when the district court ruled that the period from November 3, 1980, through March 25, 1981, was excludable. See note 1, *supra*.

---

[9]These were a joint motion to suppress evidence; petitioner Henderson's separate motion to suppress; a supplemental memorandum in support of the motion to suppress; a letter requesting postponement of the suppression hearing; a motion to identify the informant; a co-defendant's motion to join petitioners' suppression motion; and a reply to the government's memorandum of law.

[10]These included an affidavit seeking additional time within which to respond; a response to the motions to suppress and to identify the informant; a response to petitioner Henderson's suppression motion; and a challenge to the standing of Henderson and a co-defendant to contest the Watsonville search.

Petitioners also contend (Pet. 19-25) that the Section 3161(h)(1)(F) exclusion should in any event have ended once a hearing was held on March 25, 1981. As the district court itself explained, however, in no meaningful sense can the court be said to have taken petitioners' motions "under advisement" on that date, because the court had not yet received all of the material needed for a ruling. See *United States* v. *Bufalino*, 683 F.2d 639, 644 (2d Cir. 1982). Indeed, at the March 25 hearing petitioners' counsel advanced two entirely new claims — in essence, filing two new pretrial motions — involving allegations of government misconduct and misrepresentation in the warrant affidavit. Petitioners' counsel at that time acknowledged that further evidentiary development was needed for the resolution of these motions. And petitioner Thornton's attorney requested a three-month continuance because of other commitments.

In the succeeding months the government obtained the requested information relating to the alleged misrepresentation. Petitioners, however, responded by filing four additional pleadings, three of which raised new claims.[11] The government, in turn, filed five responsive pleadings in August, October, November and December 1981, including factual affidavits responding to petitioners' claims of misrepresentation.

On this record, the district court's consideration and disposition of petitioners' motions was not unreasonably delayed under any standard. In essence, petitioners "filed

---

[11]The four were a July letter challenging the government's toll record data and alleging misrepresentation elsewhere in the warrant affidavit; a September memorandum of law seeking an evidentiary hearing; an October memorandum arguing that the government had improperly destroyed the barrel in which the beeper had been hidden; and a December memorandum of law.

many consecutive motions" (*Bufalino*, 683 F.2d at 644; see *United States* v. *Brim*, 630 F.2d 1307, 1312 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981)), each of which created a new exclusion under Section 3161(h)(1)(F) and none of which was pending for an excessive period.[12] Even if petitioners' filings are viewed as a single interrelated bundle of motions, the district court did not have before it a complete set of the pleadings and factual materials necessary to resolve petitioners' claims until December 1981. In short, the delay after March 25, 1981, followed directly from the fresh claims repeatedly advanced by petitioners in new filings. When delay of this sort is attributable to the defendant, the period of delay is excludable under the Act. Cf. *Horton*, 705 F.2d at 1416; *Snyder*, 707 F.2d at 142-143; *Bufalino*, 683 F.2d at 646. Certainly, the simple fact that petitioners launched an especially vigorous and time-consuming pretrial attack would not lead to dismissal of the indictment in any circuit: "[t]he Act was not, after all, meant to provide defendants with tactics for ensnaring the courts into situations where charges would have to be dismissed on technicalities." *Ibid.*

---

[12]Petitioners themselves acknowledge (Pet. 23 n.3) that their September 14, 1981 filing amounted to a new motion that "tolled the Speedy Trial Act and created an exclusion pursuant to section 3161(h)(1)(F)."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

AUGUST 1985

JOINT

APPENDIX

No. 84-1744

In The
Supreme Court of the United States
October Term, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON,
and RUTH FREEDMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

DENISE ANTON
473 Jackson Street
San Francisco, CA 94111
(415) 986-5591

Counsel for Petitioner
SCOTT O. THORNTON

PAUL G. SLOAN
407 Sansome Street
San Francisco, CA 94111
(415) 788-2200

Counsel for Petitioner
THOMAS J. HENDERSON

ALEX REISMAN
861 Bryant Street
San Francisco, CA 94103
(415) 626-5134

Counsel for Petitioner
RUTH FREEDMAN

CHARLES FRIED
Acting Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
PATTY MERKAMP STEMLER,
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR CERTIORARI FILED MAY 6, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

The following opinion and order have been omitted in printing this appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES & OTHER EVENTS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States v. Henderson, et al.
No. CR-80-317

DATE PROCEEDINGS

8-27-80—Superseding Indictment filed

9- 3-80—Arraignment on superseding indictment

—Hearing on pretrial motions set for 10-22-80

10-22-80—Defense request and stipulation filed requesting that hearing be continued to 11-12-80

—Court signs order continuing hearing date to 11-12-80

11- 3-80 Defendants file joint motion to suppress attacking: (1) sufficiency of probable cause for issuance of search warrant; and, (2) warrantless monitoring of beeper in home.

—Defendant HENDERSON files separate motion to suppress statements and evidence seized at the time of his arrest

—Government affidavit and stipulation filed re: new date for hearing on motions and trial setting

—Court re-schedules hearing on motions for 11-26-80

11-24-80—Defendants file supplemental memorandum of points and authorities attacking veracity of allegations re: telephone records in search warrant affidavit; evidentiary hearing requested

11-26-80—Court clerk notifies parties hearing continued to 1-14-81

12-31-80—Court clerk notifies parties hearing continued to 1-28-81

1- 7-81—FREEDMAN's counsel advises clerk of his unavailability on 1-28-81;

—Hearing re-scheduled for 2-18-81

1-13-81—Defendants file motion to disclose informant information

2- 9-81—Government files responses to motion to suppress evidence and motion to disclose informant information

2-17-81—Government files response to Defendant HENDERSON's separate motion to suppress

2-18-81—All counsel appear in court; hearing continued to 3-4-81

3- 2-81—Defendants file reply to government's response to motion to suppress evidence

3- 4-81—Government files supplemental response re: standing of Bell & HENDERSON

3- 5-81—Court clerk notifies parties hearing re-scheduled to 3-25-81

3-25-81—Hearing conducted on all defense motions

4-29-81—Government provides information regarding informant to defense counsel and provides documents regarding informant to court for in-camera review

6-25-81—Government provides, by letter, material promised at 3-25-81 hearing and relevant to defendants' 11-25-80 request for evidentiary hearing

7- 6-81—FREEDMAN's counsel advises government and court, by letter, that evidentiary hearing still required

8-18-81—Government files affidavit confirming representations in letter of 6-25-81

9-14-81—Defendants file supplemental memorandum regarding recently discovered misstatement in warrant affidavit

10-23-81—Defendants file second supplemental memorandum regarding destruction of evidence; evidentiary hearing requested

11-10-81—Government files response to defendants' motion to suppress

11-25-81—Government files supplemental response to defendants' motion to suppress and request for evidentiary hearing

12-14-81—Defendants file reply to government's response

12-15-81—Government files second supplemental response to defendants' motion to suppress and request for evidentiary hearing

1-19-82—District Court files memorandum and order denying the motion to suppress filed on 11-20-80 and argued on 3-25-81

5-10-82—Hearing conducted on defendants' motion for reconsideration;

—Motion for reconsideration denied; all other pending motions denied

7-23-82—Defendants file motion to dismiss based on violation of Speedy Trial Act

9- 3-82—Government files response to motion to dismiss

9- 8-82—Hearing conducted on motion to dismiss

9- 8-82—District Court denies motion to dismiss

10- 8-82—District Court files memorandum and order denying motion to dismiss

11- 1-82—Trial commences

12- 7-82—Jury finds all defendants guilty as charged

3-23-83—Defendant HENDERSON files notice of appeal

3-30-83—Defendant FREEDMAN files notice of appeal

3-31-83—Defendant THORNTON files notice of appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States v. Henderson, et al.

Nos. 83-1075; 83-1076; 83-1112

11- 5-84—Court of Appeals' opinion affirming convictions filed

3- 7-85—Court of Appeals' order denying motion for rehearing filed

---

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CR. NO. 80-0317SW (SJ)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEFENDANT #1: THOMAS J. HENDERSON,
aka Richard Martin,

DEFENDANT #2/ SCOTT O. THORNTON,
aka Lamber Owen Thornton,

DEFENDANT #3: RUTH FREEDMAN,

DEFENDANT #4: PETER BELL,

Defendants.

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS, FILED ON BEHALF OF DEFENDANTS THORNTON, HENDERSON & FREEDMAN; REQUEST FOR EVIDENTIARY HEARING

Filed November 24, 1980

Discovery recently furnished to defense counsel compels us to supplement the Notices of Motion and Memoranda of Points and Authorities previously filed in support of our motions to suppress, as follows:

One of the crucial allegations contained in the Affidavit submitted in support of the application for the Watsonville search warrant was that Defendant HENDERSON telephoned a number listed to Defendant THORNTON in San Jose following each chemical purchase which HENDERSON made in Columbus, Ohio.

• • • •

We now learn, however, that HENDERSON did *not* call the San Jose number on the second occasion, nor any other number relevant to the investigation. (See the Declaration of Counsel which follows this Memorandum).

In our view, the affiant's representation that such a call was made can only be construed as a deliberate falsehood. Presumably, the agent who furnished the information to Agent Camps, the affiant, personally checked the Holiday Inn records, and, as we now know, that record clearly did *not* reflect a call to San Jose during HENDERSON's June visit to Columbus. If the agent did not bother to check, his statement, at a minimum, would constitute a reckless disregard for the truth, which would, of course, be chargeable to the affiant as well.

• • • •

We have already demonstrated that the statement in question, at best, represents a reckless disregard for the truth, and, more likely, constitutes a deliberate falsehood. In either event, an evidentiary hearing is mandated, and it remains merely to consider the effect of a determination by this Court that the statement was indeed false and either deliberately or recklessly made.

• • • •

In this case, either approach would produce the same result, since the statement we attack lies at the very heart of the affidavit.

• • • •

CONCLUSION

For all the foregoing additional reasons, the Defendants would respectfully submit that their Motion to Suppress must be granted:

DATED: November 21, 1980

• • • •

[Clerk's Transcript No. 29]

[Declaration of Counsel and Certificate of Service Omitted in Printing]

NOTICE OF MOTION AND MOTION FOR DISCLOSURE OF INFORMANT INFORMATION

Filed January 13, 1981

[Caption Omitted in Printing]

TO: THE UNITED STATES OF AMERICA, AND TO THE UNITED STATES ATTORNEY, G. WILLIAM HUNTER AND ASSISTANT UNITED STATES ATTORNEY, LEIDA B. SCHOGGEN, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that, on February 18, 1981, at 2:00 P.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Spencer Williams, United States District Judge for the Northern District of California, the defendants above named, through their respective counsel, will and do hereby move the Court for an Order directing the prosecution to disclose to the Court and the defendants the following information:

1. The names of any persons utilized by the government as confidential informants in the investigation leading to the instant prosecution, including but not limited to individuals at Buckeye Scientific of Columbus, Ohio who cooperated with government agents with respect to the sale and delivery of chemicals to defendants in this case.

2. The precise relationship existing, as of the period between February and August of 1980, between Buckeye Scientific including its President Richard Hall, and the Drug Enforcement Administration. This request included not only a candid statement by the government with respect to Buckeye Scientific's role, but all records and documents tending to show the nature and extent of Buckeye's

ongoing relationship with the Drug Enforcement Administration.

• • • •

[Clerk's Transcript No. 35]

[Certificate of Service Omitted in Printing]

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTIONS TO SUPPRESS

Filed February 9, 1981

[Caption Omitted in Printing]

• • • •

IV. THE AFFIDAVIT CONTAINS NO DELIBERATE MISREPRESENTATIONS BY THE AFFIANT

In a Supplement Memorandum of Points and Authorities in support of their motion to suppress defendants have alleged that the affidavit contains a deliberate falsehood or misrepresentation by the affiant, DEA Agent Richard Camps. It is argued that this alleged misrepresentation vitiates the entire affidavit. Because the statement at issue, that a telephone call was made by HENDERSON to a number listed to SCOTT THORNTON at the time of the June chemical purchase from Buckeye, was not a reckless or intentional misrepresentation, the defendants' argument must fail.

• • • •

[T]he issue is not whether or not the information in the affidavit is in fact true, but whether the affiant believes it to be true or appropriately accepts it as true. It is clear from Agent Camps' declaration that he believed the challenged information to be true and that he had no reason not to accept it as true. Therefore, the misstatement does not require the invalidation of the warrant.

If this Court finds that the challenged statements were intentionally false or made with reckless disregard for the truth in an effort to decieve the court then it must

consider whether the finding of probable cause will stand with the challenged information excluded.

• • • •

If it will not, then the defendants are entitled to an evidentiary hearing on the statements in the affidavit.

Although the defendants urge that the affiant placed primary emphasis on this telephone call, an examination of the totality of the affidavit reveals that this is not the case.

• • • •

That one call did little to add to the information already available to the agents which showed a relationship among these defendants. Although the evidence of this additional telephone call confirmed information the agents already had, it certainly was not essential to the validity of the probable cause finding of the magistrate. Because the affidavit will stand even without the challenged information no evidentiary hearing is required.

• • • •

[Clerk's Transcript No. 36]
[Certificate of Service Omitted in Printing]

GOVERNMENT'S RESPONSE TO MOTION FOR DISCLOSURE OF INFORMANT INFORMATION

Filed February 9, 1981

(Caption Omitted in Printing)

• • • •

Because the government is aware of its continuing obligation to provide *Brady* material; because the government has generally engaged in an open discovery policy with respect to this case; and because the defendants have here raised the potential defense of "outrageous government involvement", an effort is being made to obtain all relevant documentation and information about the relationship between Buckeye Scientific, Richard Hall and DEA. That information will be reviewed. Anything that clearly must be provided to the defense will be, with a request for a protective order under Rule 16 (d) (1) of the Federal Rules of Criminal Procedure, if appropriate.

The government further requests the opportunity to submit to the Court *in camera*, additional documents, statements of DEA agents or other material which may relate to any of the issues raised by the defense so that the Court may make the balancing determination required by *Roviaro*.

• • • •

[Clerk's Transcript No. 37]

[Certificate of Service Omitted in Printing]

DECLARATION OF ASSISTANT UNITED STATES ATTORNEY LEIDA B. SCHOGGEN [IN SUPPORT OF GOVERNMENT'S RESPONSE TO SPEEDY TRIAL MOTION]

Filed September 3, 1982

[Caption Omitted in Printing]

1. I am the Assistant United States Attorney assigned to the above-captioned case. It was reassigned to me from Assistant United States Attorney Greg Ward shortly before the superseding indictment was filed on August 27, 1980.

• • • •

4. On April 29, 1982, I sent letters to the Court and counsel outlining certain information regarding the informant in this case, who had been killed shortly after the superseding indictment was filed. Copies of these letters are attached hereto as Exhibit [B and] C. There was a period of delay in obtaining the material requested because it required that several other jurisdictions be contacted to supply information.

• • • •

6. On June 25, 1981, I sent to all defense counsel, with a copy to the Court, a letter regarding information about the telephone calls made from defendant HENDERSON'S Ohio motel room. A copy of that is attached hereto as Exhibit D.

7. On July 7, 1981, I received a letter from Alex Reisman, dater July 6, 1981, which is attached hereto as Exhibit E.

• • • •

[Exhibits B-E, attached]
[Clerk's Transcript No. 96]

EXHIBIT B

April 29, 1981

Honorable Spencer Williams
Room 17057
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *United States v. Henderson, et. al.*

Dear Judge Williams:

On March 25, 1981, during the arguments on the pending motions in United States v. Henderson, Thornton Freedman and Bell, the government agreed to provide certain information about the informant to the defendants. Enclosed is a copy of a letter outlining that information which has been mailed to all defense counsel. The government also stated that should there be information about the informant which we did not feel should be provided to the defense we would submit that information to the court *in camera*. Therefore, enclosed with this letter are certain documents in an envelope marked "for in camera review."

The documents included in the envelope come from the informant file on Richard C. Hall and from DEA correspondence relating to Mr. Hall. Much of the information in these documents has been summarized in the letter to defense counsel. We do not believe that either the information or the materials from which it was taken are producible in this case since Mr. Hall will not, obviously, be a witness. However, because some of the information is arguably supportive of the defendants' motions we have proceeded as we stated we would at the hearing.

Should the court decide that any of the materials submitted for *in camera* review, are to be produced to the defense. The government requests the opportunity to argue further against their production, primarily because of the fact that a number of other cases are being prosecuted which emanated from Hall's activities. As I stated in our motion responses the remaining witnesses from Buckeye who are essential to any prosecution have been reluctant to become involved in the pending cases because of the publicity resulting from the cases and because of Hall's death. We also believe that production of these materials is not called for under any theory of discovery. We would of course, like to support these contentions further if the court is inclined to produce these materials.

Sincerely,

G. WILLIAM HUNTER
United States Attorney

By: LEIDA B. SCHOGGEN
Assistant United States Attorney

lc
cc: Mr. Paul G. Sloan, Esq.
407 Sansome St.,
Suite 400
San Francisco, CA
94111

Mr. Dale B. Metcalf, Esq.
473 Jackson Street
San Francisco, CA 94111

Mr. Romualdo B.
Navarro, Esq.
95 South Market St.
The Attorneys Suite,
Room Five
San Jose, CA 95113

Mr. William Lathan
Osterhoudt, Esq.
240 Stockton Street
San Francisco, CA 94108

EXHIBIT C

April 29, 1981

To Defense Atty's

Re: *United States v. Henderson, et.al.*

Dear

The purpose of this letter is to provide you with information about the informant in this case. I am providing to Judge Williams copies of all of the materials I have received regarding the informant. In this letter I will relate the information which I think relevant to your claims. I do not think that the originals materials from DEA files should be provided to you because Hall, who was the informant, will not, obviously, be a witness in the case and because almost none of the information in the file relates to this case.

Hall became an informant for DEA on December 6, 1978. He had two prior convictions. He was convicted by the state of Ohio in 1974 for sale of marijuana and was fined $25.00. He was convicted in federal court in Ohio in 1975 for the sale of methamphetamine and was sentenced to a term of 1-5 years. He was paroled on May 3, 1977 and released May 24, 1978. He made several unsuccessful attempts to contact DEA in early 1978 for information about controlled substances.

Hall's activities as an informant for DEA consisted of providing to DEA the names of people who ordered certain chemicals from his chemical supply house, which he had started before he began working for DEA as an informant. He also permitted DEA to enclose tracking devices in certain chemicals to assist in the making of controlled deliveries. During the time that he worked with DEA Hall

was paid a total of $5,425.00 (from December 19, 1978 through August 20, 1980). Five hundred dollars ($500.00) of that was in payment for this case.

That is a summary of the relevant information about Hall's activities as an informant, based on the information in the informant file. If there are other specific items of interest or concern to you or if you have information which you would like to have verified please do not hesitate to call me.

Sincerely,

G. William Hunter
United States Attorney

By: Leida B. Schoggen
By: Assistant United States Attorney

1c
cc: Hon. Spencer Williams
United States District Judge

EXHIBIT D

U.S. DEPARTMENT OF JUSTICE

United States Attorney
Northern District of California

16th Floor Federal Building - Box 36055
450 Golden Gate Avenue
San Francisco, California 94104

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

June 25, 1981

Re: U.S. v. Henderson, et. al.
CR. NO. 80-0317 SW (SJ)

Dear Mr. (sent to all defense counsel)

After numerous unsuccessful efforts to obtain copies of the motel's telephone records, we have obtained the toll records from the telephone company with respect to the April and June calls in question. Copies of those records are enclosed for your information.

Also for your information, I have spoken to Lionel Stewart about this incident. His recollection was that in June he had gone into the Holiday Inn to ask for the information on telephone calls made from Henderson's room. He was told at that time that one of the numbers called was 408/997-0674, which he remembered from April as being Thornton's number. It was on that basis that he wrote the report which was later telefaxed to DEA in San Jose.

I hope this clears up any ambiguities with respect to the telephone calls. Please let me know if there is anything else I can do.

Sincerely,

G. WILLIAM HUNTER
United States Attorney

LEIDA B. SCHOGGEN
Assistant United States Attorney

pr
Enclosure
cc: The Honorable Spencer Williams
U.S. District Court Judge

EXHIBIT E

ALEX REISMAN
ATTORNEY AT LAW
1212 MARKET STREET • MEZZANINE SUITE ONE
SAN FRANCISCO, CALIFORNIA 94102
(415) 864-5494

July 6, 1981

Ms. Leida B. Schoggen
Assistant United States Attorney
675 North First Street, Suite 508
San Jose, CA 95112

Re: United States v. Henderson, et. al.
CR. NO. 80-0317 SW (SJ)

Dear Ms. Schoggen:

I have received your letter dated June 25, 1981, together with the telephone billing records of the Holiday Inn. Insofar as the records do not indicate the room from which the June 24, 1980, call to 997-0674 was made, it appears that the records you have provided do not obviate the necessity for an evidentiary hearing to explain the absence of any record of such a call on the records for the room which was apparently occupied by Mr. Henderson.

In addition, Mr. Navarro and I have developed information which we believe shows that the telephone records for the 997-0674 number were not subpoenaed from the Pacific Telephone Company on June 13, 1980, as alleged in Paragraph 12 of the affidavit in support of the search warrant by Agent Camps. If Agent Camps' representation is demonstrably false, as we believe it to be, the materiality of such an intentional misrepresentation in the affidavit for this search warrant is manifest. It appears equally clear that it will require an evidentiary hearing to

resolve the very substantial factual and legal issues which this situation presents.

It is my understanding that Judge Williams will be unavailable until August 15, 1981. It would make the most sense for all counsel to arrange to get together after that time in order to schedule hearing dates which are convenient to court, witnesses, and counsel in this matter.

Please contact me if you have any questions regarding the foregoing.

Sincerely,

/s/ Alex Reisman

AR/jas

cc: Honorable Spencer Williams, U.S. District Court Judge
Mr. Dale Metcalf, Attorney for Scott Thornton
Mr. Romualdo Navarro, Attorney for Ruth Freedman
Mr. William Osterhoudt, Attorney for Peter Bell
Mr. Paul Sloan, Attorney for Thomas Henderson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR. 80 0317 SW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS J. HENDERSON, et al.,

Defendants.

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

(Filed October 8, 1982)

Defendants Henderson, Thornton, Freedman and Bell are charged with various related drug trafficking offenses. Defendant Thornton filed a motion to dismiss the indictment on the basis of alleged violations of the Speedy Trial Act, 18 U.S.C. § 3162 *et seq.* The other defendants joined in the motion. At the conclusion of oral argument on the matter, the court ruled from the bench and denied the motion. The following is a brief outline of the court's reasoning.

Under the terms of the Act, a defendant must be brought to trial within seventy days after being arraigned. If trial is not commenced within the time limit imposed by the Act, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a) (2). While this time limit is to be strictly adhered to, not all post-arraignment time is considered in determining whether a Speedy Trial Act violation has occurred. Section 3161(h) provides that certain periods of time should be deemed to be "excludable delay" and thus excluded from the computaton of the Act's time limits.

Certain periods of time are "automatically excluded" under this section, including:

> (1)(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> • • •
>
> (1)(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
>
> • • •
>
> (7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

18 U.S.C. § 3161(h) (1) (F); (h) (1) (J); (h) (7).

Additionally, "in response to the concern that courts need discretion to respond to characteristics of individual cases . . . the Act permits the trial court to exclude continuances granted when the 'ends of justice' outweigh the best interests of the public and defendant in a speedy trial. 18 U.S.C. § 3161(h)(8)(A)(1976)." *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982). In determining whether a continuance should be granted under § 3161 (h)(8)(A) the court is required to consider factors set forth in § 3161(h)(8)(B):

> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of

> fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> • • •
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant of the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

This list of factors is not considered exhaustive. *United States v. Carasauillo* [sic], 667 F.2d 382, 385 (3rd Cir. 1982).

Under § 3161(h)(1)(F), "the judge must explicitly set forth his reasons for finding that the ends of justice served by the continuance outweigh other interests protected by the Act." *U.S. v. Fielding*, 645 F.2d 719, 722 (1981). The court's reasoning may be set forth either orally or in writing. Moreover, there is no requirement that the reason for a continuance, whether granted upon motion of the defendant, the government or *sua sponte*, need be set forth at the time the continuance is granted. *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir.), *cert. denied*, 449 U.S. 872 (1980).

While this case has been pending for more than two years, defendants have failed to show that this delay violates the Speedy Trial Act. A review of the record in this case shows that the bulk of the continuances granted so far were due to 1) the complexity of the issues presented in the case and difficulties in securing and assimi-

lating crucial evidence; 2) resolution of numerous pretrial motions; and 3) numerous scheduling conflicts among the various counsel involved.

As defendants concede, time for calculation of the speedy trial limits in this case began on September 3, 1980, the date of defendant Bell's arraignment on the superseding indictment. The period from July 30, 1980, the date of the original indictment, to September 3, 1980, is excludable under 18 U.S.C. § 3161(h)(7) because of the addition of Bell as a defendant.

On July 31, 1980, at the arraignment of Henderson, Thornton and Freedman on the original indictments, a motions date of September 3, 1980 and a trial date of September 22, 1980 were set. On August 20, 1980, defendant Freedman filed a motion to reset the trial date.

At the time of the original hearing date on motions, September 3, 1980, the arraignment on the superseding indictment was held as to all defendants. At that time a date for hearing on pretrial motions was set for October 22, 1980. No new date was set for trial and no ruling was made on the motion to reset the trial date, although by inference the previously set date of September 22 was vacated.

Between August 29, 1980 and October 14, 1980 six sets of discovery material were sent by the government to the defense counsel. On October 22, 1980, a stipulation was filed on behalf of all parties requesting a continuance to November 12, 1980. It was clearly the judgment of all concerned that additional time was required for the defense counsel to adequately review the discovery, examine the evidence involved in the case and otherwise prepare

for the upcoming pretrial motions. An order granting the continuance was signed on October 22, 1980.

The government argues that given the amount of discovery and the number of defendants involved, the period of time from the arraignment to and including the newly set motions date of November 12, 1980 is excludable time under § 3161(h)(B)(i), (ii) and (iv). Defendants, on the other hand, argue that the period between September 3, 1980 and October 22, 1980 cannot be considered excludable time since no continuance was requested covering this time period and no such continuance was entered *sua sponte*. Moreover, they argue that even though a continuance was entered into by stipulation on October 22, 1980, the period of time covered by the continuance is not excludable under § 3161(h) since the court did not at that time set forth the reasons for granting the continuance.

For purposes of this motion, and this motion alone, the court assumes that defendants are correct when they argue that the Act does "not permit this court to grant a continuance *nunc pro tunc*." *United States v. LaCruz*, 441 F.Supp. 1261, 1265 (S.D.N.Y. 1977). Therefore, for purposes of this motion, the court shall consider the forty eight days between September 3, 1981 and October 21, 1980 nonexcludable. The period between October 22 and November 12, however, was covered by the continuance signed on October 22. As noted above, the Act does not require a court to place its reasons for granting a continuance on the record at the same time that the continuance is granted. *United States v. Edwards*, 627 F.2d at 461. Given the reasons stated by counsel for requesting the continuance, namely to have more time to receive and review necessary

discovery and to accomodate [sic] the schedules of all counsel involved, the period covered by the continuance is clearly excludable time under § 3161(h) (8). The court therefore finds that it is in the interest of justice that this time period be considered excludable time under the terms of the Speedy Trial Act.

A motion to suppress evidence on behalf of all defendants except Bell was filed on November 3, 1980, supported by lengthy memorandum. Defendant Henderson filed a separate motion to suppress evidence on the same date. A stipulation regarding a continuance of the date for hearing these motions was filed on November 19, 1980, supported by a declaration of government counsel that additional time was required to respond to the motions. The hearing was rescheduled for November 26, 1980. On November 24, 1980, an additional memorandum in support of the motion to suppress was filed setting forth an additional ground for the motion. Two days after this additional memorandum was filed, the Court set a new hearing date for motions to January 14, 1981. On December 31, 1980, the date was again reset to January 28, 1981.

On January 8, 1981, Alex Reisman, attorney for defendant Freedman, sent a letter to the court requesting a continuance from January 21, 1981 to February 18, 1981 because of his unavailability. An order was entered to that effect on January 13, 1981. Under prevailing Ninth Circuit decisions the unavailability of defense counsel is a valid basis for a finding of excludable delay. *United States v. Nance*, 666 F.2d 353, 357-58 (9th Cir.), *cert. denied*, 102 S.Ct. 177 (1982).

On January 13, 1981, defendants filed a motion to reveal the indentity [sic] of the informant. On that date the court reset the motions hearing to February 18, 1981, pursuant to Reisman's request. The government's response to the motion to suppress evidence and the motion to reveal the informant's identity were filed on February 9, 1981. Defendant Bell filed a motion to join in the motions filed by his codefendants on February 13, 1981. A response to defendant Henderson's seperate motion to suppress was filed by the government on February 17, 1981.

On February 18, 1981, a further continuance was granted to March 2, 1981, during a court appearance by all parties. The purpose of this continuance was to provide defense counsel additional time to reply to the govenment's memoranda. On March 2, 1981, the defendants filed a reply to the government's motions responses. On March 4, 1981, the government filed a supplemental response to the motions of defendants Bell and Henderson to suppress evidence from the search, arguing that they had no standing to raise the issue. On March 4, 1981, the court continued the date for motions hearings to March 25, 1981. The court finds that the period of time between November 3, 1980 to and including March 25, 1981 is automatically excludable under § 3161(h) (F) as part of the period during which these motions were pending.

A hearing was held on March 25, 1981 on the motion to suppress and on the motion to reveal the identity of the informant. At the hearing, it became apparent that before a final decision on the suppression motion could be made, additional information about telephone calls which were part of the basis of the search warrant affadavit [sic]

had to be obtained. The court therefore refrained from entering a final order on the matter at the time of the hearing. In addition, the court did not rule on whether the informant's name should be disclosed nor did it decide the question of whether Henderson and Bell had standing to raise the suppression issue. In light of the court's anticipation of the filing of additional materials, March 25 cannot be considered the point at which these matters were finally placed before the court for decision.

On March 13, 1981 counsel for defendant Freedman requested information from the government about the airplane used in the surveillance in this case. This information was provided. On June 25, 1981, government counsel sent to all defense counsel, with a copy to the court, a letter providing details about the questioned telephone calls. On July 6. 1981, Alex Reisman sent a letter to government counsel and the court, stating: 1) that the information provided by the government was inadequate; 2) that defense investigation had revealed the possibility of an additional misrepresentation by the search warrant affiant; and 3) that an evidentiary hearing would be required to resolve the "substantial factual and legal issues which this situation presents."

On August 18, 1981, the government filed a declaration by Lionel Stewart, a DEA agent from Ohio, which stated how and when he obtained information about the telephone calls in question.

Reisman's letter of July 6 made reference to information held by defendants that indicated that, contrary to the assertions of the government, telephone records had not been subpoened from Pacific Telephone in June or

July of 1980. On September 14, 1981 defendants filed a "Supplemental Memorandum of Points and Authorities in Support of Motion to Suppress Filed on Behalf of Defendants Thornton, Henderson and Freedman; Request for Evidentiary Hearing." Attached to this memorandum is a declaration by Gina Sexton of Pacific Telephone stating that contrary to the assertions in the search warrant affadavit [sic] no subpoena had been received by Pacific Telephone before October 1980. The declaration was apparently signed sometime in May of 1981.

Following receipt of this memorandum and declaration, government counsel undertook an investigation of her own to determine when the records had been subpeonaed. The result of this investigation was a declaration signed by Ms. Sexton on October 20, 1981 which refuted the allegations made in her prior declaration.

On October 23, 1981, an additional "Supplemental Memorandum of Points and Authorities in Support of Motion to Suppress; Request for Evidentiary Hearing" was filed on behalf of all defendants, accompanied by a declaration by counsel for defendant Thornton. This pleading raised another new issue with respect to the motion to suppress. The defendants contended that the destruction of the barrel in which the beeper had been placed deprived them of constitutional due process rights. The memorandum requested that all reference to alleged beeper transmissions be excluded by the court at any trial or, in the alternative, that an evidentiary hearing be held on the issue.

On November 10, 1981, the government filed a supplemental response to the motion to suppress, attaching the

affadavit [sic] of Gina Sexton dated October 20, 1981. On November 25, 1981, a second supplemental response was filed by the government in response to the defendants' October 23 motion.

On December 12, 1981, defendants filed a memorandum and request for an evidentiary hearing, this time supported by a declaration from Paul Sloan. The government's response to this memorandum was filed on December 15, 1981. The court entered its order denying the motions to suppress on January 19, 1982.[1] As noted earlier § 3161 (1)(F) provides that any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion" is automatically considered excludable time. In light of the fact that the last relevant filing was not received until December 15, 1981, the court finds that the motions were not submitted to the court until December 15, 1981. Therefore, the period of time from March 25, 1981 to December 15, 1981 is excludable. Pursuant to § 3161 (h)(1) (j) thirty days between December 15, 1981 and January 19, 1982 are excludable time. Therefore, the period from January 15, 1982 to January 19, 1982, four days, is not excludable time.

The government filed on January 25, 1982 a motion to set the case for trial, noticed for February 3, 1982. An additional five days of time under the Act elapsed between the court's ruling and the filing of the government's motion. On February 3, 1982, the parties appeared and the case was continued to April 21, 1982 for further hearings on motions, counsel having indicated to the court a desire to file a motion to reconsider the motion to suppress.

On March 23, 1982, the defendants filed a motion to reconsider the motion to suppress. The government filed its response on April 14, 1982. On the date set for hearing, April 21, 1982 counsel for the government was unavailable due to a sudden illness. On [sic] order was entered on April 22, 1982, re-opening the motion to suppress and resetting the hearing date to May 10, 1982. On May 10, 1982, all parties appeared. The court denied a request by counsel for defendant Thornton to continue the hearing until Tony Serra, one of his other attorneys, could argue the matter personally. Arguments were heard on the motion to reconsider. A brief evidentiary hearing was held on the previously raised issue of the failure to subpeona [sic] records from Pacific Telephone before October 1980. The court heard additional arguments on the motion about the destruction of the barrel, and on Henderson's motion to suppress. All pending motions were denied.

The question of setting a trial date was also raised at the May 10, 1982 hearing. As in the past, attempting to coordinate the schedules of five defense attorneys and the attorney for the government proved difficult. The court orally noted the excludability of the period of time from May 10, 1982 to September 13, 1982, in the interests of justice. A written order was entered on May 18, 1982, denying the motion to reconsider and setting the new trial date for September 13, 1982.

The unavailability of various defense counsel for substantial periods of time between May 10, 1982 and September 13, 1982 was the reason for finding excludable delay pursuant to § 3162(8)(B). To fail to grant a continuance would result in a miscarriage of justice where so many

attorneys have spent so much time and effort to master the fine points of the case. Similarly, the case is factually complex enough and sufficiently significant enough legal issues have been raised that to deny either the defendants or the government continuity of counsel would be unreasonable and would not serve the ends of justice.

The government contends that the entire period between January 25, 1982 and May 10, 1982 is excludable because of the pendency of the motion to set a trial date. Defendants on the other hand argue that motions to set trial dates should not be considered as tolling the provisions of the Act while they are pending. While there is no case directly on this issue, defendants rely on *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 375 (2nd Cir. 1979) wherein the court held that the period of time during which a motion to dismiss on speedy trial grounds was pending is not excludable under § 3161(h)(1)(F). In a recent decision, however, the Ninth Circuit reached a contrary result and held that such motions require a finding of excludable time. *United States v. Arkus*, Slip Op. 1710-14 (9th Cir. April 23, 1982). Thus, defendants' analogy fails. Pursuant to § 3161(h)(1)(F), delays resulting from *any* pretrial motion is excluded. In light of this broad language the court finds no reason to exempt from its application good faith motions filed by government in an effort to expedite the trial of cases. The government's motion was pending from January 25, 1982 until May 10, 1982. This period of time is therefore excludable. Even if the matter was considered submitted on April 14, 1982, it would have been under advisement for less than thirty days and the period from April 14, 1982 until May 10, 1982 would thus be excludable under § 3161(h)(1)(J).

Moreover, even if motions to set a trial date are not covered by the provisions of § 3061(h), the result would still not be a violation of the Speedy Trial Act. Pursuant to the government's motion a trial date should have been selected on February 3, 1982. The time for setting the date was put off due to the representations of defense counsel that they wanted time to file a motion to reconsider. While the period of time from March 3, 1982 until March 23, 1982 may not technically fall under the provisions of § 3161(h)(1)(F), the defendants need for additional time present their motion to reconsider akes this period excludable under § 3161(h)(8)(B)(ii) as being in the interests of justice. Accordingly, even when viewed in the light most favorable to the defendants, at most only nine days of non-excludable time ran between January 25, 1982 and May 10, 1982.

At most then only sixty-six days of non-excludable time has passed since the arraingment [sic] of all four defendants. Thus, there has been no violation of the Speedy Trial Act in this case. Accordingly, defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Dated: 10/7/82

/s/ Spencer Williams
United States District Judge

P. 8 [1] The court's order of January 19, 1982 states that the parties were informed at an unrelated hearing that the motions were denied. This is an error. While the court may have informally told the parties that it was leaning towards denying the motions, no final decision was announced until the release of the order.

[Clerk's Transcript No. 104]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SPENCER WILLIAMS, JUDGE

NO. CR-80-0317

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENDERSON, THORNTON, FREEDMAN, AND BELL
Defendants.

_____/

REPORTER'S TRANSCRIPT
OF HEARING ON FEBRUARY 18, 1981

PROCEEDINGS

The Clerk: In the matter of the United States versus Henderson, Thornton, Freedman and Bell.

Mr. Sloan: Paul Sloan appearing for Mr. Henderson. Mr. Henderson is present.

Ms. Schoggen: Leida Schoggen appearing for the United States, your Honor.

Mr. Osterhoudt: William Osterhoudt for Mr. Bell.

Mr. Metcalf: Dale Metcalf on behalf of Thornton.

Mr. Navarro: Nomuldo Navarro appearing on behalf of Ruth Freeman [sic]. She's present.

Mr. Reisman: I'm Alex Reisman, also appearing for Ruth Freeman [sic], your Honor.

Mr. Sloan: We have had some discussion among counsel, your Honor, and it occured to us there are a number of issues that we think need to be addressed orally.

The Court: They have been thoroughly briefed.

Mr. Sloan: I think the Government's response requires some considerable discussion, and it occured to us that in the interest of the efficient operation of the calendar, we might set this on another day other than a day when your regular calendar is to be called, if that would be convenient for you.

Mr. Reisman: A day when we can perhaps set aside an hour, something of that sort.

The Court: I could keep my regular calendar on the fourth down so we would have an hour for it.

How do you feel about it, Miss Schoggen?

Ms. Schoggen: That's fine, your Honor. I would also like to request Mr. Bell filed — or a motion was filed on behalf of Mr. Bell, I believe either Thursday or Friday to which I would like additional opportunity to respond.

The Court: Granted.

Mr. Reisman: We are talking about March fourth. here? . .

The Court: Yes.

Mr. Reisman: I could —

The Court: I might be down here. I'm starting a case tomorrow that has a San Jose venue, it's a civil case, but I think we will take the first four or five days in San Francisco anyhow.

I might be able to get on the seco.. or third.

Mr. Reisman: The fourth is better; I planned to be in Arizona on the third, but I can work around that, I guess.

The Court: Fourth at 2:00 o'clock. Today was specially set. I had a speech I had to give in San Francisco.

Ms. Schoggen: 2:00 o'clock is fine. Are you starting the Martell and Southwick trial on the second?

The Court: What case?

Ms. Schoggen: U.S. versus Martel and Southwick?

The Court: I hope not.

Ms. Schoggen: I'm trying it, that's why I'm asking.

The Court: Is there a speedy trial problem?

Ms. Schoggen: I think we've had — I think there's been an order entered by your Honor with respect to the complexity of the case that will resolve that problem.

The Court: I also have U.S. versus Piazza which is supposed to be tried after this civil rights case.

Ms. Schoggen: Ten days is probably a good estimate on that case.

The Court: What kind of case is it?

Ms. Schoggen: It's a check-kite and fraud-by-wire case.

The Court: Okay.

Ms. Schoggen: And thinking realistically, now, we are talking about a five-day government case, so ten days is probably right. It's probably five to seven.

The Court: Civil rights case is supposed to take about a month. Hope it doesn't. If it does, it will go into the latter part of March. We will have to interrupt it if we have some speedy trial problems.

Ms. Schoggen: Okay.

The Court: This is a court trial, so let's say that case is not going to go on the day set.

Ms. Schoggen: So the motions on the fourth are fine.

(Whereupon the hearing was concluded at this time.)

[RT (2/18/81) 3-6]

REPORTER'S TRANSCRIPT

WEDNESDAY, MARCH 25, 1981

PROCEEDINGS

The Clerk: General number 800317, United States versus Thomas Henderson, Scott Thornton, Ruth Freedman, Peter Bell.

Ms. Schoggen: Leida Schoggen appearing for the United States, your Honor.

Mr. Osterhoudt: Your Honor, William Osterhoudt appearing for Peter Bell who's present.

Mr. Sloan: Paul Sloan for Mr. Henderson who's present.

The Court: Mr. Sloan.

Mr. Metcalf: I'm Dale Metcalf appearing for Scott Thornton, although Tony Serra is attorney of record. I'm standing in for Tony Serra at this time.

Mr. Reisman: Okay. I'm Alex Reisman. I'm appearing on behalf of Miss Freedman along with Ramon Navarro.

The Court: Okay: That everybody. Defendants are present?

Mr. Osterhoudt: Yes, they are, your Honor.

The Court: All right. Let's take the motion on the disclosure of the informant first. Anyone still pressing that?

Mr. Osterhoudt: Well, your Honor, I don't know what extent we are pressing it, but I would say this, that

after reviewing the prosecution's response, I think basically that the government concedes arguendo both the matters alleged by me in my declaration and they also agreed to supply relevant documents as I read the prosecutor's response.

The Court: Well, the guy is dead, isn't he?

Ms. Schoggen: Mr. Hall is dead, yes.

Mr. Osterhoudt: Mr. Hall is dead, Your Honor, but the reason that we wanted this disclosure isn't so much to get people's names, which isn't of so much importance to us, as to find out exactly what the relationship of the government to Buckeye was, to see what provides the basis for a motion to dismiss for outrageous government involvement in the case.

Now, what the prosecution has done I think in its response is to say first that assuming everything that we allege is true, we haven't made out a case for outrageous involvement.

The Court: Right.

Mr. Osterhoudt: And that would be something to be argued. On the other hand, the government also indicates that they're in the process of gathering relevant documents relating to the government's relationship with Buckeye Chemical, and they'll supply those and they'll get some other ones to court in camera perhaps.

The Court: What time is it set for trial?

Mr. Osterhoudt: It isn't set for trial.

The Court: What's the deadline on the filing?

Ms. Schoggen: Well, it depends on how long these motions remain under consideration by Your Honor.

The Court: You mean that you're going to do additional discovery to find out if there's additional acts they did, that will be deemed outrageous, if you could wait a couple, three or four years, just look around?

Ms. Schoggen: Well, I don't think it'll take that long. The problem, as I indicated in our response, is that there have been several cases initiated. I mean prosecution's initiated by way of indictment in several districts —

The Court: Which describe the activities.

Ms. Schoggen: Well, some of them do, yes. In fact, I believe that's where the defendants got the information between the other actions that have been ongoing, and the High Times magazine articles, they know probably more about it than I do. But I have contacted the two agents in Ohio who were primarily working with Buckeye. I have contacted two other assistant U. S. attorneys in other districts who have worked with the same basic set of background facts on Buckeye, and I have gotten I think most of the informant file from DEA.

There are some things that I haven't yet gotten, although they're supposedly on their way, but they've gone from one district to another to another, and I'm sort of fifth or sixth down the line. But I don't think we're talking about any more than a matter of a couple more weeks, and as I indicate in my response, we will — I will review that material, and if I think there's anything in there that is ready or exculpatory or supportive of this particular theory, I will turn it over.

If I think there are things that are subject to somebody's, you know, to judgment, basically, or if the court wishes, I'll turn anything I don't want to turn over to the defense over to Your Honor, and leave that decision to you.

The Court: Okay.

Mr. Osterhoudt: Well, I think — I'm sorry, did I interrupt?

Ms. Schoggen: No.

Mr. Osterhoudt: I think, Your Honor, that whether or not our showing, or our allegations would be sufficient to dismiss the indictment at this stage, I think they are sufficient to require the government to comply with the motion by turning over things that aren't sensitive. If there are things in the files of Buckeye that the government feels might jeopardize the safety of any person, I wouldn't expect those. I would expect the government to give them to you, to see whether — to balance our need for them against the sensitivity of keeping them secret.

As far as the facts are concerned, what's been alleged as to the government involvement, I would say that it's not sufficiently damaging or outrageous to require any kind of a motion to suppress.

The Court: Subject to Allison it might turn out that way, might be considered.

Now I'll just take this under submission or dismiss it without prejudice to bring it again or whatever you want.

Mr. Osterhoudt: Well, I think, Your Honor — I'm sorry, if I can address that question, what Miss Schoggen

has indicated, that she'd prefer to go through the material she has which we obviously don't have, and see if anything meets her definition of Brady or exculpatory material, and give it to us. I have respect for the prosecutor's fairness. I think that puts too great a burden on her and any showing we make, which may well be insufficient to justify dismissal — I think we should be entitled to anything in the government's files relating to the Buckeye which the government can't show is sensitive and should be suppressed from us, and the proper form I guess for making that suggestion was in camera, with Your Honor.

Ms. Schoggen: I don't think we have any argument. I think we're all agreed.

The Court: Right.

Ms. Schoggen: Is turn over the obvious and turn the rest to you for inspection.

The Court: This matter is continued to another date?

Mr. Osterhoudt: Yes, that would be fine.

The Court: Let's continue it to whatever date you set for trial. Then we'll either dismiss it or grant it.

Ms. Schoggen: And as soon as I get the rest of the documentation — I have most of it, but as soon as I get the rest of it I will turn it over, and if anything comes up from that, we can have new motions at that time.

Mr. Osterhoudt: Fine, Your Honor. Thank you very much.

The Court: Okay. I'll set it the same day for trial, but you can put it on calendar sooner than that if you want to.

Mr. Osterhoudt: If I find anything helpful I would bring a dismiss before that.

The Clerk: No trial date.

The Court: No, we haven't talked about trial date yet. We'll get to that after the next motion.

All right. Next motion is motion to suppress.

Mr. Reisman: My colleagues have asked me to start out on that motion, Your Honor.

The Court: What part of the tape.

Mr. Reisman: I think we're well aware and the court is well aware that the matter has been fully briefed, but we feel that one particular area that stands out is the question that relates to probable cause. That is the first point that was raised in our papers, assuming that all of the information was properly before the magistrate, which, of course, we assume only for the sake of argument. And so there was not probable cause to believe that there was contraband or a laboratory at the Woodland Hills Lane address, at the particular date the warrant was issued.

[RT (3/25/81) 1-7]

* * * *

The Court: Motion denied. I'll prepare a memo on it so that you can have a record for appeal. Okay.

Mr. Sloan: There are a couple of other aspects of the motion, just for the record, Your Honor, that we should touch on.

The Court: All right.

Mr. Sloan: I think that our principal argument was this one.

The Court: Others, right.

Mr. Sloan: The — we want to preserve for the record, the argument that I don't think has been addressed by the prosecution, and that is the notion that if a warrant is not to be required, for monitoring a beeper, and installing a beeper, nevertheless, at the minimum, probable cause should be required. There should be some showing of probable cause before the agents are permitted to undertake the monitoring activity.

[RT (3/25/81) 29-30]

* * * *

The Court: Okay.

Mr. Sloan: — . . . Now, with respect to involving the false statements in the affidavit, on the phone calls —

The Court: Does the government admit the phone calls were not made?

Ms. Schoggen: We're not prepared to admit that yet. We have agreed to stipulate for the purposes of this hearing, that the information that was available — well, that Agent Camps relied on information which came from Ohio and the information that came from Ohio came in the form of a report. What I have required Agent Stewart in Ohio to do is get the original records and if he can't, — I mean I've talked to him, and he has made representations to me that he got that information from people at the hotel.

I've asked to backtrack on that, and have indicated to him that either he finds the original records indicating that that phone call was made, or we'll end up having the hearing on that aspect of it, if your Honor feels that the —

The Court: It's material.

Ms. Schoggen: Right. And that it was a deliberate misstatement or that there is a possibility that it was a deliberate misstatement, and that excluding it from a search warrant would destroy the probable cause that you've already found to be there.

Mr. Metcalf: In that connection, Your Honor, just — I'd like to remind the court that that particular phone call is mentioned no fewer than three times in the affidavit.

Six, paragraph nine and paragraph twenty. And in particular, in paragraph twenty, the affiant suggests that the number of phone calls and the telephone call in question leads him to believe that the Woodland Hills Lane can be a likely location, et cetera.

In other words, it appears that the affiant placed rather great emphasis on the phone call in question and perhaps the magistrate did the same.

Mr. Sloan: What I wanted to say was simply this, Your Honor, and perhaps Miss Schoggen's statement has taken care of the problem. Our position is, that Agent Camps' good faith, assuming that he acted in good faith, is no answer to the inquiry.

The Court: I understand that. Yeah.

Mr. Sloan: If an agent in Cincinnati gave him false information, doesn't do any good that he didn't bother to explain —

The Court: Has to be material, does it not?

Mr. Sloan: It has to be material. And I think that —

The Court: If you say turn left and you have to turn left, that's not —

Mr. Sloan: That's right. But I think as Mr. Metcalf just pointed out, the agent's penultimate paragraph in the affidavit, it recites only three facts. One, the phone calls between Henderson and Thornton, and two other things.

Mr. Metcalf: Well, two actually.

Mr. Sloan: Right, or two facts, as a matter of fact.

He in reaching his conclusion, obviously placed great emphasis on the fact that those phone calls were made. Otherwise, again, you have to focus on the question of whether or not there was probable cause to believe that the Woodland Hills, on July 17th, some activity was going on. And without those phone calls to connect all these people together, it seems to me that his conclusion evaporates. And I don't know what other records are available, because the report that was furnished to us by the Holiday Inn, in which we attached to our supplemental memorandum of points and authorities, had attached to it, the actual toll records from the Holiday Inn. Now it may be that there's some error, but the records that were furnished to us and what form the basis for the motion, was the very records that the government has furnished to us already.

So it's not something that we've just made up.

The Court: If we deleted the information as to the phone calls, look at what was left, and found there was still probable cause left, then would it be all right if we found that sufficient —

Mr. Sloan: Well, there's some question in my mind about that, Your Honor. I suppose it's possible to read the Supreme Court cases in that fashion, but it doesn't seem to me that they necessarily stand for the proposition that if a government agent swears falsely —

The Court: I know. I'm talking about a mistake.

Mr. Sloan: Nevertheless, say, well, we'll just give him a little time in the corner and perhaps demote him and that's the end of the inquiry, I just can't believe it.

The Court: I wasn't saying that. I was saying a mistake. I could see, for instance, a warrantless search, which is done for the purpose of really harassing or violating someone, injuring someone, that sort of thing. It's in my mind much more damaging than if a guy who thinks he has permission goes in to make a search. Those are in my view at least — I don't want to see government misconduct, and I look at intent in those situations.

Now, if there's a claim of fabrication of information in it for the purpose of obtaining a satisfactory warrant and you can show real fabrication, then I'd look at it much different than some —

Mr. Sloan: Course, all we can show at this point is the records that have been furnished to us by the Holiday Inn, clearly establish that no such phone call was made.

Now, Agent Stewart has one of two responses that he can give to that. Either that he simply called the Holiday

Inn, and that's what he told him over the phone—although one wonders how that's possible, because they can only recite from their own records—or he looked at the records and somehow misinterpreted them. But again the record seemed so straightforward, because there appear to be computer print-out cards that are generated by the telephone equipment at the Holiday Inn, with specific dates and calls.

And how one can misinterpret those kinds of records, to say that not only in April, but also in June —

The Court: Phone the lobby, from the hotel room, right?

Ms. Schoggen: Right.

Mr. Sloan: From the room, that was the basis of the statement in the first place, that a review of the records or inquiry at the Holiday Inn revealed that Mr. Henderson had again called Mr. Thornton's number in San Jose. And we're saying that there is simply no record extant from which such conclusion could have been drawn, and we think at the minimum we're entitled to some explanation from Agent Stewart as to how it was that that information got communicated to Mr. Camps.

The Court: Okay. Well, I want to think about that one.

Mr. Sloan: We have —

The Court: It's your position, Ms. Schoggens, will it go on this basis, until you get more information about what really happened —

Ms. Schoggen: With respect to the phone call?

The Court: Yeah.

Ms. Schoggen: Yes. What I would like to do is to have — I mean Agent Stewart is supposedly picking up the original document from the hotel, and, if those documents indicate that there was in fact a phone call made, then that takes care of the problem. If they indicate that there wasn't, then it would be my position that we probably ought to have a hearing on —

The Court: Basis of information.

Ms. Schoggen: Whether, where he came up with that information, which he passed on to Camps. Now, he did not send the records to Camps, at the time — the information that he gave to Camps, came through by way of a report he had written, which I — which is attached to our response, indicating that — I think your wording is correct, inquiry had been made at the Holiday Inn, and it doesn't say in that report whether they reviewed records or whether they got it by telephone from Holiday Inn or what.

So, it would be my position that either we should get an affidavit from Stewart or have a hearing in which he testifies. Of course, it appears that the records —

The Court: Okay.

Ms. Schoggen: — did not reflect such telephone call.

The Court: Okay. Any other matters?

Mr. Sloan: I have filed on behalf of Mr. Henderson a motion, Your Honor, that was directed at a statement obtained from Mr. Henderson during the course of —

The Court: By Camps.

Mr. Sloan: Right. Okay, Judge. At the time when Mr. Henderson was at Mr. Camps' office to give handwriting examplars, and the government has filed a response, and I would like to just comment briefly on the government's response.

[RT (3/25/81) 35-41]

* * * *

The Court: It looks like a very strong motion on the part of defendants. But I'll take it under submission and go on the materials given and I'll try and get this out as soon as possible so we can proceed with trial.

Anything else to bring up tonight?

Mr. Sloan: I don't think so. Could we ask that Your Honor perhaps, could we leave these charts? If we could leave them with you for a few days in the event you could reconsider?

Mr. Reisman: I'd like to have them marked and made part of the record.

The Court: All right. Why don't you mark them and we'll keep them here to be available.

And how soon after we decide this matter would you like to have a trial date?

Mr. Metcalf: Your Honor, probably the major consideration—

The Court: Depends on how I rule, right?

Mr. Metcalf: The major consideration there would be Serra's, Tony Serra intends to act as the trial lawyer for Mr. Thornton, and you may know, he's entering into a rather lengthy jury trial very soon, Russell Little, retrial

of that case and, although I don't have a specific length for that trial, I would hope that you —

The Court: When does that start? Right soon, you say?

Mr. Metcalf: Well, I'm not just—soon, very — very soon.

Mr. Reisman: I thought it was Monday.

The Court: Next Monday?

Mr. Metcalf: But my information is that that will last approximately three months.

The Court: That's a suitable time, is it? I don't know if it is or not.

Ms. Schoggen: I didn't bring my book in. I don't know whether I've got —

Mr. Metcalf: Then I can convey more specific information to the court.

The Court: Pardon me?

Mr. Metcalf: I could convey more specific information to you perhaps through your clerk by telephone.

The Court: Well, three months is quite a period of time.

Mr. Sloan: Perhaps what Your Honor could do is in the order that is issued, with rulings on the motions, you could set a date for us to appear.

The Court: Okay. Let's get it.

Mr. Sloan: Soon thereafter. And we could then set a trial date. And Mr. Serra's position will be clarified.

Mr. Metcalf: I'll have specific information at that time.

Mr. Reisman: Just one thing. I'm unclear, Your Honor. I understand where we are on every motion except the one that relates to the phone call, the so-called July — June 24th phone call.

The Court: I haven't told you anything about that already.

Mr. Reisman: Well, I understand.

Mr. Osterhoudt: You said something about motion denied. But I hope I misunderstood you.

The Court: I said I'll include it in a memo.

Mr. Osterhoudt: I see.

The Court: So you'll understand the basis for it and so the circuit will understand the basis for it. And if I grant the motion on this one I'll put down the reasons for it so the circuit can understand on that too. See, they like to understand not only what we rule on things, but they like to know the reasons.

Mr. Reisman: The evidentiary hearing is still up in the air.

Ms. Schoggen: On the telephone call.

The Court: You'll have information on that one. He's sending it to you now.

Ms. Schoggen: We have two different sets of information going but hopefully I'll have it by the end of this week.

The Court: Okay.

Ms. Schoggen: I just want to make sure, I filed the motion which is probably inappropriately now entitled, the standing motion.

The Court: What kind of motion?

Ms. Schoggen: Relates to standing, to raise the suppression issues.

Mr. Sloan: Well, that relates to both Mr. Henderson, Your Honor, and Mr. Bell. I wonder if rather than extending the proceedings this afternoon, in the event Your Honor denies the motion to suppress, it may be that you don't need to reach that issue in any case, in the event that you grant it, we can then discuss the standing problem.

The Court: You're arguing that they didn't have the standing to raise these motions.

Ms. Schoggen: That's correct.

Mr. Sloan: That's only to Henderson and Bell.

The Court: Okay. All right.

Mr. Sloan: As to Henderson I filed an affidavit in support of the motion that I filed originally, and in that affidavit Mr. Henderson claimed ownership interest in the chemicals that were left at the Woodland Hills address, and an expectation of privacy in those chemicals, and like the cases that the Government cited, where the defendant said he had no expectations.

The Court: Again, I want to look at that and consider it. Then I'll let you know and ask you to file a memo in opposition, and Miss Schoggen, if you will, when you get the final word, what's considered to be the final word on

the telephones, why don't you address it to the counsel in a letter and send me a copy and then they can say they wish to proceed with an evidentiary hearing or not.

Ms. Schoggen: Fine.

The Court: Because it may be that what you find will not add any more to what you already have.

Ms. Schoggen: Right. Or it may say, well they got the wrong Holiday Inn, or something. You know.

The Court: I don't know. We'll decide it after you get it what we'll do with it.

Mr. Osterhoudt: Okay. Thank you, Judge.

(Discussion off the record.)

The Court: All right. We'll stand adjourned.

Mr. Reisman: Thank you, Your Honor.

[RT (3/25/81) 44-48]

• • • •

REPORTER'S TRANSCRIPT

September 8, 1982

PROCEEDINGS

• • • •

Mr. Reisman: In sum, I think there is none of us who have been party to this case and the proceedings of the case that don't feel ambivalent about standing before you and saying this motion should be granted.

The Court: Ambivalent?

Mr. Reisman: Maybe I used the wrong word.

The Court: I think that you are eager that I do grant your motion.

Mr. Reisman: I agree. There is a sum sense, Your Honor, that we have participated in the delay of the case. The point I wish to make is that it is encumbant [sic] on the Court ultimately to make sure that the law, spirit and the letter of the law is followed. If we have partaken in someway in the delay in this case that should not be held against the Defendant's rights under the Speedy Trial Act. I believe the Speedy Trial Act is very clear that it puts the burden on the Court to ensure—

The Court: Defense counsel would lay in the weeds and wait until time runs and then come in.

Mr. Reisman: Well, the Court may have that feeling about the circumstances. I think the law is vested in the Court, in the Judge, and it is incumbent upon the Judge to make sure that the law is enforced, and the defense can

either waive nor entrap rights under the Speedy Trial Act. That is, neither waive their rights nor entrap the Judge. The law doesn't permit that kind of defense.

The burden falls in this circumstance on the Court and I feel that the arguments made and the calculations that have been made make it very clear there was a violation in the case.

The Court: Thank you.

Miss Schoggen.

Ms. Schoggen: I think Your Honor has just pointed out one of the things that is most difficult about this motion. That is, with one exception in this case, the delays without exception have been due to defense motions, letters or other activities.

The Court: Motion to reconsider. Difficulties in getting together on dates.

Ms. Schoggen: Unavailability.

They are now requesting additional continuance of the trial date because of the unavailability of Mr. Serra, which was the cause of the last four-month continuance because Mr. Serra was unavailable.

If you look at it on its surface, what it appears to be is a series of delays initiated by the defendants, not objected to by the Defendants, Defendants have made no move to speed the case along, to do anything to resolve the case. Then once they've lost the motions, they bring this motion to dismiss the case for violations of the Speedy Trial Act.

The only case that I have been able to find that deals with that particular issue is a case I did not cite in my motion. It is United States versus Hencye at 505 Fed Sub [sic] 968, at 972, basically condemning just that sort of process.

[RT (9/8/82) 15-17]

* * * *

Ms. Anton: . . . I kind of object to the characterization of all the continuances being on the part of the defense, because I feel that the major period of delay that we are talking about are two or three months that the United States Attorney takes in providing information which she should have been able to provide in a week. We are talking about three months while the court is considering a motion to set a trial date and three months in submission to the Court. I don't think those are due to delays on the part of the defense.

[RT (9/8/82) 23-24]

* * * *

PETITIONER'S

BRIEF

No. 84-1744

In The
Supreme Court of the United States
October Term, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON,
and RUTH FREEDMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

DENISE ANTON
473 Jackson Street
San Francisco, CA 94111
(415) 986-5591

Counsel for Petitioner
SCOTT O. THORNTON

ALEX REISMAN
861 Bryant Street
San Francisco, CA 94103
(415) 626-5134

Counsel for Petitioner
RUTH FREEDMAN

PAUL G. SLOAN
407 Sansome Street
San Francisco, CA 94111
(415) 788-2200

Counsel for Petitioner
THOMAS J. HENDERSON

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

(1) Whether only such delay as is reasonably necessary for a fair processing of pretrial motions is excludable under § 3161(h)(1)(F) of the Speedy Trial Act, Title 18, United States Code, § 3161 et seq.

(2) Whether delay following a hearing on pretrial motions and following submission of all papers essential to a resolution of the motions argued at that hearing is excludable under § 3161(h)(1)(F) of the Speedy Trial Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

REPORTS

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 - A-34) is reported at 746 F.2d 619; the order of the Court of Appeals denying a petition for rehearing (Pet. App. B, A-35 - A-39) is also reported at 746 F.2d 619. The opinion of the District Court (JA 22) is not reported.

—o—

JURISDICTION

The judgment of the Court of Appeals affirming petitioners' convictions was entered on November 5, 1984. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on March 7, 1985. The petition for writ of certiorari was filed on May 6, 1985 and granted on October 15, 1985. The jurisdiction of this Court is invoked under Title 18, United States Code, § 1254(1).

—o—

STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C. § 3161, provides, in relevant part:

* * *

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within 70 days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate

on a complaint, the trial shall commence within 70 days from the date of such consent.

• • •

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

• • •

(F) delay resulting from any pretrial motion, from the filing of the motion through conclusion of the hearing on, or other prompt disposition of, such motion;

• • •

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

• • •

—o—

STATEMENT OF THE CASE

On July 30, 1980, an indictment was returned in the Northern District of California, charging each of the above named petitioners with two counts of violations of Title 21, U.S.C. §§ 841(a) (1) and 846. (CT. Nos. 6, 7) Petitioners were arraigned on this indictment on July 31, 1980. (CT. Nos. 13, 14, 17)

On August 27, 1980, a 5-count superseding indictment was returned against petitioners and a fourth defendant, Peter Bell.[1] (CT. No. 14) Count I alleged a conspiracy among petitioners and Bell to manufacture and sell methamphetamine in violation of Title 21, U.S.C. § 846. Count II charged petitioners Thornton and Freedman with the manufacture and possession for sale of methamphetamine in violation of Title 21, U.S.C. § 841(a) (1). Count III charged Bell with traveling interstate in connection with the activities alleged in Count I, in violation of Title 18, U.S.C. § 1952(a) (3), and Counts IV and V alleged similar violations by petitioner Henderson.

Petitioners were arraigned on the superseding indictment on September 3, 1980. (CT. Nos. 18, 19, 20) On November 1, 1982, 789 days later, trial commenced. (CT. No. 107)

The question presented herein is whether a violation of the Speedy Trial Act occurred as a result of (1) the District Court's failure to schedule a timely hearing on pretrial motions; and (2) the District Court's delay, after finally conducting a hearing, in ruling on motions argued at that hearing.

The principal period of delay to which petitioners object is the period from the filing of the first pretrial motion in this case on November 3, 1980, to the filing of

---

[1] On the day petitioners' trial commenced, November 1, 1982, defendant Bell's case was severed. (CT. No. 108)

the District Court's written ruling on that same motion on January 19, 1982. The following events are relevant to petitioners' claim that this delay resulted in a violation of the Speedy Trial Act:

On November 3, 1980, petitioners filed their first pretrial motion, a joint motion to suppress evidence (CT. Nos. 24, 25, 26) noticed for hearing on November 12, 1980, a date previously set by stipulation (CT. No. 23). Petitioners challenged the search which led to the evidence underlying the charges against them on the ground that the search warrant affidavit was insufficient to establish probable cause, and on the ground that the affidavit was based on information illegally obtained through the warrantless installation and monitoring of a beeper in a residence.

On November 3, 1980, petitioner Henderson also filed a motion to suppress evidence and statements seized from him at the time of his arrest.

On November 12, 1980, the scheduled hearing date, the government had not yet filed a response to any of petitioners' motions. One week later, on November 19, 1980, the Assistant United States Attorney filed a declaration and stipulation signed by all parties requesting that the hearing be continued to a date following November 19, 1980. (CT. Nos. 27, 28)

On November 24, 1980, based on "discovery recently furnished", petitioners filed a supplemental memorandum and request for evidentiary hearing regarding alleged material misrepresentations in the search warrant affidavit relating to purported telephone calls placed by Petitioner Henderson. (CT. No. 29, JA 5)

On November 26, 1980, the hearing date established by the court pursuant to the previously filed stipulation, the government still had not filed a response, and the court, on its own motion, rescheduled the hearing to January 14, 1981. (CT. No. 30) No reason was stated for this 49-day postponement. On December 31, 1980, the court continued the hearing date to January 28, 1981, an additional 14 day delay. (CT. No. 34) No party had requested a continuance, and no explanation was given for the postponement. When counsel for petitioner Freedman informed the clerk that he would be unavailable on January 28th, the hearing was continued to February 18, 1981.

On January 13, 1981, petitioners filed a motion for disclosure of informant information. (CT. No. 35, JA 8) This motion was noticed for hearing on February 18, 1981.

On February 9, 1981, nine days before the scheduled hearing, the government filed its first responsive pleadings: a response to petitioners' motion to suppress of November 3 and November 24, 1980 (CT. No. 36, JA 10), and a response to the informant information disclosure motion of January 13, 1981 (CT. No. 37, JA 12). On February 17, 1981, one day before the hearing, the government filed a response to petitioner Henderson's separate motion to suppress. (CT. No. 39)

All counsel appeared in court on February 18, 1981, and at that time the hearing was continued to March 4, 1981. (JA 35)

On March 2, 1981, petitioners filed a reply to the government's response of February 9, 1981 (CT. No. 44), and, two days later, on March 4, 1981, the government filed a supplemental memorandum regarding the standing of Mr.

Bell and petitioner Henderson to bring the motion to suppress. (CT. No. 45)

On March 4, 1981, the day scheduled for hearing, the court clerk advised the parties that the hearing was postponed to March 25, 1981. (CT. No. 46)

The hearing of petitioners' pretrial motions was finally held on March 25, 1981. (JA 39) At the hearing, the government requested an opportunity to submit additional material before the court ruled on whether to conduct the evidentiary hearing requested in petitioners' November 24th motion to suppress. The court suggested that the prosecutor submit the information in letter form to petitioners and that petitioners then advise the court whether they continued to insist on an evidentiary hearing. (JA 54-55) As explained more fully hereinafter (Argument II), all other motions argued at the hearing were either denied, submitted or deferred to trial.

On June 25, 1981, three months after the hearing and seven months after the motion raising the telephone call issue had been filed, the prosecutor submitted the promised material regarding the evidentiary hearing. (JA 18) In a letter dated July 6, 1981, petitioners advised the government and the court of petitioners' position that an evidentiary hearing was still required. (JA 20) The court took no action.

On August 18, 1981, the government filed an affidavit confirming the representations made in its June 25th letter. (CT. Nos. 51, 61) Once again, the court took no action.

Nearly one month later, on September 14, 1981, petitioners, upon discovering that there may have been another misrepresentation in the search warrant affidavit,

filed a new request for an evidentiary hearing. (This request was not docketed.) On October 23, 1981, petitioners filed another motion following their discovery that the government may have destroyed important physical evidence. (CT. No. 52)

On November 10, 1981, the government filed its response to both the September 14 and October 23, 1981 defense pleadings. (CT. No. 64) A supplemental government response was filed on November 25, 1981. (CT. No. 65) The defense replied on December 14, 1981 (CT. No. 66), and the government filed a further response on December 15, 1981. (CT. No. 67)

On January 19, 1982, the District Court filed an order denying the suppression motion, filed November 3, 1980, and argued March 25, 1981, attacking the sufficiency of the search warrant affidavit and the warrantless installation and monitoring of a beeper. (CT. No. 68) The court did not address any other matter raised at, or following, the March 25, 1981 hearing. In open court on May 10, 1982, the court denied a motion for reconsideration of its January 19, 1982 order and all other unresolved motions.

Petitioners' motion to dismiss based on Speedy Trial Act violations was filed on July 23, 1982 (CT. Nos. 87, 88), and a hearing on that motion was held on September 8, 1982. Following argument, the District Court denied the motion. (CT. No. 99) In a written order filed on October 8, 1982 (CT. No. 104, JA 22), the District Court ruled that

at most, only 66 days of the delay in this case were non-excludable, and, therefore, there had been no violation.[2]

The trial commenced on November 1, 1982 (CT. No. 107), and on December 6, 1982 all three petitioners were convicted as charged. (CT. Nos. 140, 141, 142)

Petitioner Henderson filed a notice of appeal on March 23, 1983 (CT. No. 160); petitioner Freedman filed a notice of appeal on March 30, 1983 (CT. No. 163), and petitioner Thornton filed a notice of appeal on March 31, 1983 (CT. No. 164).

On November 5, 1984, petitioners' convictions were affirmed by a 3-judge panel of the Ninth Circuit, Judge Ferguson dissenting. The Court of Appeals ruled that all time during which pretrial motions are pending, regardless of whether such time is necessary for a fair processing of those motions, is excludable under § 3161(h) (1) (F). In its ruling, the Court made no mention of the fact that a significant portion of the delay that it deemed excludable under subsection (F) occurred *after* a hearing was conducted on pretrial motions.

On November 19, 1984, petitioners filed a petition for rehearing. That petition was denied on March 7, 1985. Judge Ferguson filed a dissent from the denial of rehearing.

A petition for certiorari was filed in this Court on May 6, 1985, and on October 15, 1985, certiorari was granted.

---

[2] Specifically, the court ruled that the following delay was nonexcludable: forty-eight days from September 3, 1980 to October 22, 1980; four days from January 15, 1982 to January 19, 1982; five days from January 20, 1982 to January 25, 1982; and a tentative nine days from January 25, 1982 to February 3, 1982.

SUMMARY OF ARGUMENT

Section 3161(h) (1) (F) of the Speedy Trial Act, Title 18, U.S.C. § 3161, et seq., excludes from the seventy day period of permissible delay between arraignment and trial, delay "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Four circuits have imposed a "reasonably necessary" limitation on the period of delay defined by this section. By declining to adopt such a limitation, the Ninth Circuit has endorsed an interpretation of the Act which opens the door to the very kinds of delay the Act was designed to prevent. In the words of Judge Warren Ferguson, dissenting from the majority opinion below, "[t]he majority opinion sets the Speedy Trial Act on its head and will allow trial judges to delay ruling on pretrial motions indefinitely." (Pet. App., A-26.) In this case, 789 days elapsed between the date petitioners were arraigned on the superseding indictment and the date trial commenced. The principal component of that extraordinary period of delay was attributable to the resolution of timely filed pretrial motions.

The Ninth Circuit's majority opinion concluded that the literal language of § 3161(h) (1) (F) did not admit of a "reasonableness" gloss, a conclusion which petitioners argue is both unnecessary and unworkable, and which, if accepted, defeats the rights of both defendants and the public to swift justice.

Petitioners argue, in addition, that whatever resolution of the "reasonableness" issue may obtain, § 3161(h) (1) (F) provides a clear, unambiguous time-exclusion cut-off point when a hearing on pretrial motions has been con-

ducted. To interpret the section, as the Ninth Circuit majority has done, to permit unbounded post- as well as pre-hearing excludable time removes altogether the controls Congress sought to impose on the processing of federal criminal prosecutions. If the majority position is permitted to stand, the Speedy Trial Act will have been legislated out of existence by judicial fiat.

ARGUMENT

I.

NOT ALL OF THE DELAY BETWEEN THE FILING OF PETITIONERS' FIRST MOTION AND THE HEARING CONDUCTED ON ALL MOTIONS WAS REASONABLY NECESSARY FOR A FAIR PROCESSING OF PRETRIAL MOTIONS; ACCORDINGLY, NOT ALL OF THAT DELAY IS EXCLUDABLE TIME UNDER SECTION 3161(h) (1) (F)

A. Only Reasonably Necessary Delay Should Be Excludable Under Section 3141(h)(l)(F).

Section 3161(h) (1) (F) provides that "delay resulting from any pretrial motion, from the filing of the motion to the conclusion of the hearing on, or other prompt disposition of such motion" shall be excluded in computing the time in which a defendant's trial must commence.

In the instant case, petitioners' first pretrial motion was filed on November 3, 1980. A hearing on this and two additional motions was finally held on March 25, 1981. The District Court ruled in its October 8, 1982 order, that the entire 143 days from the filing of the first motion to the hearing on all motions was automatically excludable pursu-

ant to Title 18, U.S.C. § 3161(h)(1)(F), without regard to whether that entire period was reasonably necessary for a fair processing of the motions. Such an interpretation would allow the court to prolong a criminal case indefinitely by repeatedly postponing the hearing dates on pretrial motions. This was not the intent of Congress.

As originally enacted in 1974, the pretrial motion exclusion was far more limited than under the 1979 amendment quoted above. It applied to "delay resulting from hearings on pretrial motions". Its language was expanded in 1979 "to avoid an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing." H. Rep. No. 96-390, 96th Cong., 1st Sess. 11 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 805, 815.

In expanding this exclusion, Congress recognized that an exclusion limited to one or two actual hearing days was virtually meaningless. However, Congress did not fail also to recognize that too broad a rule would actually tend to encourage delay in the disposition of pretrial motions. The Senate Report notes "if basic standards for prompt consideration of pretrial motions are not developed, this [1979] provision could become a loophole which could undermine the whole Act." S.Rep. No. 96-212, 96th Cong., 1st Sess. 34 (1979) [1979 Senate Report].

Instead of imposing rules on the courts to limit such abuse, Congress encouraged the courts to use their local rules "to set uniform standards for motion practice." 1979 Senate Report, pp. 33-34. Congress did not leave the courts unaware of the specific abuse about which it was concerned. The Senate Committee specifically noted that it

did not "intend that additional time be made eligible for exclusion by *postponing the hearing date . . . of the motions beyond what is reasonably necessary.*" 1979 Senate Hearing, pp. 33-34 (emphasis added).

The Second Circuit in *United States v. Cobb,* 697 F.2d 38 (2nd Cir. 1982) was the first court to interpret this language in the context of a claim of unreasonable pretrial delay. Based on the legislative history of Subsection (F) and the provision of Subsection (F) stating that the period of delay excludable for pretrial motions ends with the "hearing on or other prompt disposition" of the motions, the *Cobb* court concluded:

> The period of allowable excludable delay applicable to a pretrial motion begins automatically with the making of the motion and runs for a period of time that is 'reasonably necessary' to conclude a hearing or complete the submission of the matter to the court for a decision. *Under this view, long postponements of hearing dates, unless reasonably necessary, would not qualify as excludable time, nor would unnecessarily long extensions of time for the submission of papers.*
>
> 697 F.2d at 44 (emphasis added).

Any other interpretation of the exclusion would "in many circumstances render the Act meaningless." 697 F.2d at 44.

In *United States v. Novak,* 715 F.2d 810 (3rd Cir. 1983), *cert. den., sub nom Ware v. United States,* 465 U.S. 1030, 104 S.Ct. 1293, 79 L.Ed.2d 694 (1984), the Third Circuit adopted a similar standard. "We do not believe that Congress intended the length of admissible exclusions under this Section to be bounded only by the filing date and hearing date, without any regard to reasonableness." 715 F.2d at 819. Accordingly, the Court ruled:

> All of the time involved in long postponements of hearing dates and long extensions of time for filing responses will not qualify for exclusion under Subsection (F), unless the District Court determines that such delays are reasonably necessary to ready the motion for judicial consideration.
>
> 715 F.2d at 810.

In so holding, the court noted that: "the 'reasonably necessary' limit we have adopted with regard to extensions of time under Subsection (F) is well adapted to providing the flexibility necessary under Subsection (F)." 715 F.2d at 820.

A "reasonably necessary" limitation has also been adopted by the Seventh Circuit, *United v. Janik,* 723 F.2d 537, 543-44 (7th Cir. 1983) ("The phrase 'other prompt disposition' implies that the court may not delay a criminal trial indefinitely by deferring a hearing on a pretrial motion indefinitely. The government does not, and could not, contend otherwise"), and the First Circuit, *United States v. Mitchell,* 723 F.2d 1040, 1047-48 (1st Cir. 1983) ("we recognize, as did the Congress, that an open-ended time period for hearing pretrial motions could defeat the intent and purpose of the Act").

Although the Fourth Circuit has not addressed the issue, a Maryland District Court has ruled that the reasonable standard should be applied. *United States v. Smith,* 563 F.Supp. 217, 220 (D.Md. 1983) aff'd 741 F.2d 1546 (4th Cir. 1984), *cert. den., Smith v. United States,* — U.S. — , 105 S.Ct. 2122, 85 L.Ed.2d 486 (1985) (Automatic exclusion of all time elapsed between the filing of a motion and the conclusion of the hearing on that motion "would subvert the essential purpose of the Speedy Trial Act").

The Fifth Circuit has ruled that, while the terms of § 3161(h)(1)(F) are "all but absolute," the prompt disposition language "might be taken to imply that such matters should be promptly disposed of and that might justify, in an egregious case, disregarding some portion of the pendency." *United States v. Horton,* 705 F.2d 1414, 1416 (5th Cir. 1983), *cert. den.,* 464 U.S. 997, 104 S.Ct. 496, 78 L.Ed.2d 689 (1983).

Although cases from the Eighth Circuit, *United States v. Brim,* 630 F.2d 1307 (8th Cir. 1980), *cert. denied,* 452 U.S. 966, 101 S.Ct. 3121, 69 L.Ed.2d 980 (1981), and *United States v. Fogarty,* 692 F.2d 542 (8th Cir. 1982), *cert. den.,* 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983), and the Eleventh Circuit, *United States v. Stafford,* 697 F.2d 1368 (11th Cir. 1983), have characterized the exclusion of Subsection (F) as "absolute", these cases did not deal with the specific issue raised herein—unreasonable delay.

Furthermore, recent cases have indicated that the matter is far from resolved in either the Eighth or Eleventh Circuits. In *United States v. Turner,* 725 F.2d 1154 (8th Cir. 1984), the defendant had urged the court to "refine" its ruling in *United States v. Brim, supra,* and adopt the "reasonably necessary" standard. The court found that it need not reach the issue. In *United States v. Campbell,* 706 F.2d 1138 (11th Cir. 1983), and *United States v. Mastrangelo,* 733 F.2d 793 (11th Cir. 1984), the courts also ruled that under the facts of the cases before them, it was unnecessary to decide whether there is a reasonableness limitation upon the Subsection (F) exclusion. These cases suggest that the law in both circuits is unsettled and in an

appropriate case would be reconsidered in light of the legislative intent.

The Ninth Circuit, in the decision below, is the only court actually confronted with the issue to reject completely a reasonable limitation upon Subsection (F). The reasoning underlying the Ninth Circuit's inflexible position is not persuasive.

In holding that even unreasonable delay is excludable under Subsection (F), the Ninth Circuit relied principally on a strict construction of the statutory language, noting that "Congress knew how to require that a period of delay be reasonable when it wished to do so." (Pet. App. A-9) However, it is a well-settled principle of statutory construction, announced more than a century ago in *United States v. Kirby,* 74 U.S. (7 Wall) 482, 486-487, 19 L.Ed. 278 (1868), that:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law should prevail over its letter.
>
> *Government of the Virgin Islands v. Berry,* 604 F.2d 221, 225 (3d Cir. 1979).

Recently, in *Heckler v. Edwards,* 465 U.S. 870, 104 S.Ct. 1532, 1538, 79 L.Ed.2d 878 (1984), this Court instructed that the courts are not to give surface literal meaning to a statutory provision when that interpretation is not consistent with the "sense of the thing." As Judge Ferguson noted in his dissent below (Pet. App. A-27) the sense of the Speedy Trial Act is to ensure a speedy trial.

An interpretation of Subsection (F) which could leave the setting of trial to the whims of anyone of the parties or the court cannot be considered a sensible construction of that statute.

In ruling as it did, the Ninth Circuit wanted to ensure that the parties to an action know when the Speedy Trial Act clock starts and stops; presumably, a reasonably necessary standard would be too difficult for the parties to calculate. As that court recognized, however, (Pet. App., A-8 - A-10) the reasonableness standard is employed, with no apparent confusion, in another section of the Speedy Trial Act, § 3161(h)(7). Moreover, since the *Cobb* decision, a reasonableness limitation on Subsection (F) has been employed successfully in a number of cases. See, *e.g., United States v. Pringle,* 751 F.2d 419 (1st Cir. 1984); *United States v. Rush,* 738 F.2d 497 (1st Cir. 1984) *cert. den., Rush v. United States,* — U.S. —, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Simmons,* 763 F.2d 521 (2nd Cir. 1985); *United States v. Brown,* 736 F.2d 807 (1st Cir. 1984).

The Ninth Circuit also expressed legitimate concern that the Speedy Trial Act not be interpreted in a manner that would give short shrift to pretrial litigation. (Pet. App. A-13) However, neither petitioners nor any court has ever suggested that the procedural rights of the defendant should be sacrificed on the altar of speedy trial. The diversity of individual cases requires a degree of flexibility, and no rigid time limits need or should be developed. Petitioners do not advocate strict time limits, only some sort of apparent judicial oversight of the process.

Extensions, postponements, and continuances should and must be granted in many cases, but never without either request or reason. If continuances pursuant to § 3161

(h)(8)[3] should be granted only in unusual cases and, "as a general matter . . . should be rarely used" (S. Rep. No. 1921, 93rd Cong., 2nd Sess. 41 (1974)), certainly, postponements of hearing dates should at least be subject to a reasonableness requirement. The contrary, automatic exclusion of all delay without regard to duration or justification, would be inconsistent with the history and purpose of the Speedy Trial Act.

For all these reasons, petitioners respectfully submit that this Court should rule that only that delay reasonably necessary for the fair processing of pretrial motions should be excludable under § 3161(h)(1)(F).[4]

B. Uniformity Among The Circuits Regarding The Scope Of The Section 3161(h)(1)(F) Exclusion Is Necessary.

In its opposition to the petition for certiorari filed herein, the government argues that this Court need not resolve the conflict among the circuits regarding whether the exclusion of § 3161(h)(1)(F) should apply to all time be-

---

[3] A continuance is excludable under § 3161(h)(8) only when the court makes a finding, on the record and supported by reasons, that the ends of justice served by taking such action outweighs the best interests of the public and defendant in a speedy trial.

[4] It should be noted that a local rule in effect at the time of this case, provides that "all pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal document." (U.S. District Court, Northern District of California, *Plan For Prompt Disposition Of Criminal Cases,* Section II.4(f)(3) at 12 (Apr. 7, 1980)) Although this rule does not offer much guidance, it certainly is sufficient to invoke the reasonably necessary standard clearly intended by Congress. Accordingly, even if the Court cannot read a reasonable limitation into the statutory language of § 3161 (h)(1)(F), it must read such a limitation into this rule.

tween filing and conclusion of hearing on pretrial motions or only to such delay as is reasonably necessary for fair processing of pretrial motions. The government suggests that as long as the court and the parties are aware of the "controlling rules", the amount of excludable delay is "relatively unimportant". (Government's Opposition, page 11).

The amount of delay, however, is the very focus of the legislation, and it was anticipated that rules would be promulgated not just to be observed, but to prevent an unreasonable amount of delay. Compliance with various "controlling rules" at the expense of compliance with the purpose of the Speedy Trial Act is not acceptable.

Moreover, the legislative history of the Speedy Trial Act establishes that uniformity was a goal of this legislation. In passing the Speedy Trial Act, Congress took into account the defects inherent in Rule 50(b) of the Federal Rules of Criminal Procedure, which provided that each District Court "shall prepare a plan for the prompt disposition of criminal cases" within its district. Congress intended to eliminate the variances among the districts caused by this rule, and to adopt a uniform definition of the defendant's right to a speedy trial. H. Rep. No. 93-1508, 93rd Cong. 2nd Sess., 6 (1974), *reprinted in* 1974 U.S. Cong. & Ad. News, 7401, 7406 [1974 House Report]. Accordingly, to allow non-conformity in the circuits is to circumvent the logic of the Speedy Trial Act.

C. The Delay In This Case Was Not Reasonable.

In the instant case at least six lengthy postponements were made before a hearing on all pretrial motions was

finally held on March 25, 1981. The record does not reveal the reasons for all of the postponements, but most appear to be attributable to the government's failure to file timely responses to petitioners' motions and the District Court's failure to monitor the proceedings. Nothing in the record indicates that the numerous postponements or the long extensions of time for submission of responses were reasonably necessary. To the contrary, the delays appear to be excessive and unjustified, and petitioners submit that these delays resulted in a violation of the Speedy Trial Act.[5]

II.

DELAY FOLLOWING A HEARING ON PRETRIAL MOTIONS AND FOLLOWING SUBMISSION OF ALL MATERIAL NEEDED FOR RULING ON MOTIONS ARGUED AT THAT HEARING IS NOT EXCLUDABLE UNDER SECTION 3161(h) (1) (F).

The District Court herein invoked Subsection (F) to exclude nearly six months of delay following the hearing

---

[5] The government has suggested that petitioners somehow waived their Speedy Trial Act claim by failing to make a timely objection to alleged "findings" that the period between November 3, 1980 and March 25, 1981 was excludable under Subsection (F). (Government's opposition, p. 3, n. 1, citing § II.6(b)(2)(1) of the *Plan For Prompt Disposition Of Criminal Cases, supra.)* As petitioners have previously pointed out (pages 9-11 of reply brief filed on December 13, 1983 in the Court of Appeals) under § II.6(b)(2)(1) of the local plan, counsel has five days in which to object to a determination concerning excludable time made on the record by the court or the magistrate as required by § 11.6(b)(1). In the instant case, there was no court determination of any excludable time on March 25, 1981, and a programmed entry of an excludable time code each time the filing of the document was entered into a computerized docket is not a substitute for such a determination.

conducted on pretrial motions on March 25, 1981. The court's ruling was in error. To hold that delay occurring *after* a hearing on pretrial motions and *after* submission of all papers necessary to determine those motions should be excludable under Subsection (F) is contrary to both the spirit and the letter of the law.

The plain language of the Speedy Trial Act provides that the Subsection (F) exclusion continues through either (1) the conclusion of the hearing on pretrial motions, or (2) other prompt disposition of pretrial motions. In this case, the hearing on motions concluded on March 25, 1981. A prompt disposition of the motions would have occurred long before the hearing, but in no event, more than thirty days after the hearing.[6]

The government has argued, however, that the "prompt disposition" language does not even apply to situations in which a hearing has been conducted. That language "provide[s] a point at which time will cease to be excluded, where motions are decided on the papers without a hearing." 1979 Senate Report, p. 34. Thus, under the government's interpretation of prompt disposition, and in keeping with the government's concern that the language of the Speedy Trial Act be strictly interpreted, the Subsection (F) exclusion must end, in all cases in which a hearing has been conducted, at the conclusion of the hearing, or, in this case, on March 25, 1981.

---

6 It cannot be argued that the District Court's disposition in the instant case was, in any sense of the word, prompt. The court ruled on the motion to suppress filed on November 4, 1980, in a written order filed on January 19, 1981. It ruled from the bench on May 10, 1982, on all other unresolved motions, including a suppression motion filed on November 24, 1980 and an informant motion filed on January 13, 1981.

A literal interpretation of the statutory language, so vigorously urged by the government and the Ninth Circuit in rejecting the reasonably necessary standard, is clearly appropriate in determining the cut-off point for the Subsection (F) exclusion. In this instance, a literal interpretation is in harmony with the legislative intent and history of the Speedy Trial Act. At the same time, this interpretation in no way unduly restricts the parties or the court, for if the court is not prepared to rule on any motion at the hearing, it may take up to 30 days to issue its order.[7] Moreover, if the court needs more than 30 days to rule on a given motion, the court may extend that period, simply by setting forth in the record the reasons why additional time is necessary.[8] This procedure ensures that the court will always have enough time to make an informed ruling; it also ensures, by requiring that the need for additional time be explained on the record, that a ruling will not be unnecessarily deferred for long periods of time.

---

7 18 U.S.C. § 3161(h)(1)(J) permits the exclusion of "delay reasonably attributable to any period, not to exceed 30 days, during which any proceeding concerning the defendant is actually under advisement by the court."

8 In limiting the Subsection (J) exclusion to 30 days, the Committee stated:

> This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in Section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

1974 House Report, p. 33, *reprinted in* 1974 U.S. Cong. & Ad. News, p. 7426. See also, *United States v. Janik, supra*, 723 F.2d at 544.

In the instant case, the Ninth Circuit failed to address petitioners' argument that delay following the hearing was improperly excluded under Subsection (F). Nor has the government responded to this argument, other than to suggest through some distortion of the record that two new claims were advanced on March 25, 1981, thus marking the beginning of a new Subsection (F) exclusion. The government also suggests that petitioners had filed so many pretrial motions that it would have been impossible for the court to dispose of all of them within 30 days of the hearing. A review of the record reveals otherwise.

Petitioners herein set forth the motions pending at the time of the March 25th hearing, the status of all motions at the close of the hearing, and the ultimate disposition of the motions, which establish more persuasively than any argument, that the District Court did not need and, in fact, did not utilize, the period from March to January to resolve any of the motions.

(1) Motion For Disclosure Of Informant's Information. (filed January 13, 1981; government's response filed February 9, 1981).

Contrary to the government's recent assertions, and the District Court's ruling of October 8, 1983 (JA 22, 28-29), this was not solely a motion for disclosure of the informant's identity. In anticipation of a motion to dismiss based on government overreaching, petitioners sought through this motion disclosure of information regarding the relationship between the Drug Enforcement Administration and the company which allegedly supplied precursor chemicals to petitioners herein. (JA 8, CT. No. 35)

In its response of February 9, 1981, the government recognized that the information sought was relevant to a claim of "outrageous government involvement" (JA 12), and at the hearing, it was this aspect of the motion that was stressed (JA 40).

The prosecutor and defense counsel agreed at the hearing that the prosecutor would, as she suggested in her response, turn over to the defense the requested information to which it was obviously entitled, and turn over the rest of the information to the court for an in camera inspection. (JA 41-43) If the information supplied by the government or the court supported a claim of government misconduct, the petitioners would file a motion to dismiss. Otherwise, the matter was deferred to the date of trial, at which time the court would rule. (JA 43-44)

On April 29, 1981, the government provided the promised material to the court and counsel. (JA 14)

On May 10, 1982, the court ruled that, pending a decision on whether it would disclose to petitioners the documents submitted in camera, the motion would be denied. (Reporter's Transcript of Proceedings of May 10, 1982, [hereinafter, RT (5/10/82)], p. 39).

(2) Petitioner Henderson's Separate Motion To Suppress Evidence. (filed November 3, 1980; government response filed February 17, 1981).

This motion was argued and submitted. (JA 50-51) The judge stated that it looked like a very strong motion, but that he would take it under submission "and go on to the materials given . . . . I'll try to get this out as soon as

possible so we can proceed with trial." (JA 51) The court orally denied the motion, without explanation, on May 10, 1982 . (RT (5/10/82), p. 35).

(3) Petitioners' Joint Motion to Suppress.

Petitioners moved to suppress the search of petitioner Freedman's home on three grounds:

(a) Motion To Suppress On Ground That Search Warrant Was Issued Without Probable Cause. (filed November 4, 1980; government response filed February 9, 1981; petitioner's reply filed March 2, 1981).

This motion was argued, submitted and denied. (JA 44) At the close of the hearing, however, the court indicated that it would elaborate its ruling in a memorandum, "So you'll understand the basis for it and so the Circuit will understand the basis for it." (JA 53)

In a written opinion filed on January 19, 1982, the court denied this motion. (CT. No. 68)

(b) Motion To Suppress Based On Ground That Agents Lacked Probable Cause And Warrant For Monitoring Of Beeper In Residence. (filed November 4, 1980; government response filed February 9, 1981, petitioner's reply filed March 2, 1981).

This motion was argued and submitted. (JA 45)

The court denied the motion in its written order of January 19, 1982. (CT. No. 68)

(c) Motion To Suppress Based On Alleged Misstatement In Search Warrant Affidavit; Request For Evidentiary Hearing. (filed November 4, 1980; government response filed February 9, 1981; petitioner's reply filed March 2, 1981).

This motion was made on the ground that the affiant deliberately or recklessly stated in the search warrant affidavit that a telephone call had been made from the Holiday Inn in Columbus, Ohio to petitioner Thornton's home. Petitioners had information that indicated that no such call had been made. (JA 5-6)

In the government's response, the prosecutor did not dispute that the statement regarding the telephone call was false. (JA 10) Instead, she argued that no hearing was required and the motion should be denied because (1) the affiant believed the statement was true and thus there was no bad faith (JA 10), and (2) even if the affiant knew that the statement was false, the telephone information was not material (JA 11).

Midway through the March 25th hearing, the prosecutor inexplicably changed her position and requested an opportunity to obtain telephone toll records determinative of whether the affiant's statement was actually false. (JA 45-46, 50) The prosecutor hoped to have such records by the end of the week. (JA 53)

On June 25, 1981, the prosecutor provided the information (JA 18), and on July 6, 1981, counsel for petitioner Freedman notified the court and government that petitioners still wished to proceed with the hearing (JA 20-21).

The District Court Judge did nothing until May 10, 1982, when he stated that he believed that the information filed by the government "sufficiently answered the problem that was raised." (RT (5/10/82) p. 21)

(d) Bell's And Henderson's Standing To Raise Suppression Motion. (filed by government on March 4, 1981).

It was suggested that the standing issue should be deferred until the court ruled on the suppression motions. (JA 54) The court stated that it would review the materials already filed (Petitioner Henderson had attached an affidavit regarding standing to his original November motion to suppress [JA 54]) and asked Mr. Bell and petitioner Henderson to file a memorandum. No such request was ever made.

Clearly, the only matter that was not fully submitted or deferred[9] at the March 25th hearing was the request for an evidentiary hearing, and that was only because the government expressed a desire to submit records to rebut allegations made in petitioner's November 24, 1980 motion.

---

[9] As numerous courts have recognized, deferral of a motion until its actual hearing or submission is not excludable under Subsection (F). See, *United States v. Cobb, supra,* 697 F.2d 38; *United States v. Novak, supra,* 715 F.2d 810; *United States v. Brown, supra,* 736 F.2d 807; *United States v. DeLongchamps,* 679 F.2d 217 (11th Cir. 1982).

Any time the government requests an extension of time in a criminal case, it is under an obligation to make certain the basis for the continuance is well founded. See, 18 U.S.C. § 3162(b)(2), (3) and (4). The government failed to meet this obligation.

At the time that the government requested an opportunity to supply the telephone toll records, it had already been in possession of petitioners' motion for four months, and had already asserted in its response that regardless of what the records revealed, the motion to suppress and request for evidentiary hearing should be denied. The government gave no reason for its change of position. Under the circumstances, affording the government additional time to provide records was unnecessary and unwarranted.

Certainly, then, when the government failed to provide the promised records within a reasonable period, the court should have deemed the matter submitted based on the government's previously filed response and, barring any other action, rendered a decision. If, because of the prosecutor's delay, the court found that additional time was necessary, it could have granted a continuance on its own motion pursuant to § 3161(h)(8). The fact that the judge may have needed additional time in which to rule, however, did not automatically create an additional, unbounded period of excludable time under the auspices of Subsection (F).

Responsibility for speedy trial enforcement rests primarily on the District Court and the government, and not on the defendant. *United States v. Didier,* 542 F.2d 1182 (2nd Cir. 1976); see also, *United States v. Rivera,* 427 F.Supp. 89 (D.C. N.Y. 1977). Accordingly, absent a finding of need for additional time, the District Court had an obli-

gation to rule within thirty days on all motions argued at the March 25th hearing. Instead, the Court waited until January, 1982 to rule on the suppression motion filed on November 4, 1980 and fully submitted at the hearing. It waited until May, 1982 to rule on the request for an evidentiary hearing and Petitioner Henderson's separate suppression motion.

Under the circumstances, it is clear that the 141 days between April 25, 1981, when the Court's orders were due, and September 14, 1981, when the Act was tolled by the filing of another motion,[10] were nonexcludable under any section of the Speedy Trial Act.

Even assuming that, under some interpretation of Subsection (F), the delay pending the government's submission of the telephone toll records was excludable, all pending motions must be deemed to have been submitted by no later than July 6, 1981, when counsel for petitioner Freedman informed the government and the court that the documents provided by the government on June 25, 1981 did not obviate the need for the requested evidentiary hearing. At that point, a hearing had been held and the court had everything it expected and everything it needed in order

[10] New pleadings were filed on September 14, 1981, which tolled the non-excludable period and reinvoked the provisions of Subsection (F). That fact, however, does not cause the 141 non-excludable days between April 25th and September 14th to somehow evaporate. See, e.g., *United States* v. *Janik, supra,* 723 F.2d 537, where the court held that the prompt disposition requirement of § 3161 (h)(1)(F) could not be circumvented by the district court's reopening of a hearing on a motion to suppress more than 30 days after the matter had been taken under advisement.

to rule on all matters before it.[11] The 30 day "under advisement" period of subsection (J) thus became operative on July 6, 1981, and every day beyond August 5, 1981 was nonexcludable. At a minimum, then, 40 nonexcludable days (in addition to the 57-60 acknowledged by the District Court and accepted by the Ninth Circuit (Pet. App. A-6)) had elapsed between arraignment and commencement of trial, and the requirements of the Speedy Trial Act had clearly been violated.

CONCLUSION

The Speedy Trial Act was enacted to clarify a defendant's constitutional right to a speedy trial and to protect an important public interest in speedy trials. To achieve this two-fold purpose, the Act strictly controls the conduct of the parties and the court itself during the pretrial proceedings. Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself; for the Act is as much aimed at the delay caused by judicial congestion and mismangement as it is aimed at the deliberate stalling of counsel. 120 Cong. Rec. 41618 (1974) (statement of Senator Ervin).

Clearly, there was no policing of the district court's behavior in the instant case. Delays were frequent, ex-

[11] Guidelines issued to aid courts in applying the Speedy Trial Act provide that the starting date for the under advisement exclusion is "the day following the date on which the court has received everything it expects from the parties, examining physicians, etc., before reaching a decision." *(Guidelines To The Administration Of The Speedy Trial Act of 1979,* as amended, pp. 42-43 (1981).)

tensive and unexplained. Petitioners submit that these delays resulted in a violation of the Speedy Trial Act; thus the judgment of the Ninth Circuit, affirming petitioners' convictions, should be reversed.

Respectively submitted,

DENISE ANTON
Counsel for Petitioner
SCOTT O. THORNTON

PAUL G. SLOAN
Counsel for Petitioner
THOMAS J. HENDERSON

ALEX REISMAN
Counsel for Petitioner
RUTH FREEDMAN

RESPONDENT'S

BRIEF

No. 84-1744

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS J. HENDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below properly excluded delay attributable to petitioners' pretrial motions in calculating time limits under the Speedy Trial Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1744

THOMAS J. HENDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 746 F.2d 619. The order of the district court denying petitioners' Speedy Trial Act motion (J.A. 22-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1984. A petition for rehearing was denied on March 7, 1985. The petition for a writ of certiorari was filed on May 6, 1985 and granted on October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act of 1974 provides in pertinent part (18 U.S.C. 3161(h)):

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence;
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
> >
> > * * * * *
> >
> > (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
> >
> > * * * * *
> >
> > (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

Additional provisions of the Act that are cited in the text are reproduced in the appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, in violation of 21 U.S.C. 846. Petitioners Thornton and Freedman also were convicted on one count charging the manufacture and possession with intent to distribute of methamphetamine, in violation of 21 U.S.C. 841(a)(1); petitioner Henderson also was convicted of traveling in interstate commerce with intent to promote the manufacture and possession of methamphetamine, in violation of 18 U.S.C. 1952(a)(3). Henderson was sentenced to concurrent terms of four years' imprisonment on each count and fined $2,000 on the conspiracy count. Freedman was sentenced to concurrent terms of three years' imprisonment on each count, to be followed by a special parole term of two years on the substantive count. Thornton was sentenced to consecutive terms of 10 years' imprisonment on the conspiracy count and five years' imprisonment on the substantive count, to be followed by a 20-year special parole term. He also was fined $30,000 on each count. The court of appeals affirmed (Pet. App. A1-A34).

1. The evidence at trial showed that petitioners Thornton and Freedman operated a laboratory for the manufacture of methamphetamine and phenyl-2-propanone at their home in Watsonville, California. On several occasions, petitioner Henderson purchased chemicals for the laboratory in Ohio. Prior to one such purchase federal agents placed an electronic beeper in the container of chemicals; the agents ultimately traced the beeper to the Watsonville home. The following day the agents searched the home pursuant to a warrant and discovered the laboratory. Thornton and Freedman were arrested at the time of the search; Henderson was arrested elsewhere and his van was seized. Pet. App. A2-A3; Tr. 103-107, 116, 296-300, 325-337, 437-486, 589, 631-634, 667-677, 708, 749, 774-793, 801-836, 906, 1039-1040, 1152-1162, 1201-1207, 1218-1234, 1251-1262, 1382, 1411-1418, 1444-1468, 1590, 1703-1705, 1757-1766, 1790.

2. a. A superseding indictment against petitioners and co-defendant Peter Bell was returned on September 3, 1980.[1] On November 3, 1980, petitioners filed two pretrial motions (one joint motion and one on behalf of Henderson) seeking suppression both of evidence seized from the Watsonville laboratory and of other evidence (J.A. 1, 27).[2] A hearing on these motions was scheduled for November 26, 1980. On November 24, 1980, however, petitioners filed a supplemental memorandum advancing additional factual grounds—in particular, challenging representations made in the warrant affidavit about telephone toll records—in support of their suppression motions. J.A.

[1] Bell was not named in the original indictment, which was returned on July 30, 1980.

[2] The joint motion sought suppression of the beeper signals intercepted in Watsonville, of all material obtained in the course of the search of the Watsonville laboratory, and of all material obtained as a consequence of Thornton's arrest in Watsonville. In support of the motion, petitioners contended that the beeper had been placed without statutory authority or probable cause; that the search warrant supporting the search in Watsonville was defective; and that Thornton's arrest was a consequence of the execution of the assertedly defective warrant. In particular, petitioners challenged the sufficiency of the affidavit supporting the warrant, contending that it did not make out probable cause and failed to establish the credibility of a confidential informant.

Henderson's separate motion sought suppression not only of the evidence obtained in Watsonville, but also of beeper signals intercepted in Ohio and Kentucky; of material obtained as a consequence of Henderson's arrest; and of statements made by Henderson to a Drug Enforcement Administration agent several weeks after his arrest. Henderson's arguments concerning the beeper signals and the search warrant echoed those made in support of the joint motion.

5-7, 27.[3] The court accordingly twice rescheduled the hearing on the suppression request, first to January 14 and then to January 28, 1981 (J.A. 1-2, 27).

Twenty days before the scheduled hearing, on January 8, 1981, Freedman's attorney informed the court that he would be unavailable on the hearing date and requested a continuance to February 18, 1981. Shortly afterwards, on January 13, 1981, petitioners filed a motion to reveal the identity of confidential informants and related information (J.A. 2, 27-28). The court responded to these developments by rescheduling the hearing on the outstanding motions to February 18, 1981 (J.A. 2, 27). Prior to that date—on February 9, 1981—the government filed its responses to the joint suppression motion and to the motion to reveal the informant identities (J.A. 2, 28). Meanwhile, on February 13, 1981, petitioners' co-defendant Bell sought to join in their suppression claims (J.A. 28).

The parties appeared in court as scheduled on February 18, 1981. Petitioners, however, sought a further postponement, suggesting that "in the interest of the efficient operation of the calendar" another hearing date should be set (J.A. 36). The district court granted petitioners' request to be provided with additional time to reply to the government's responses, and the case was continued to March 2, 1981 (J.A. 2, 28). On that date petitioners filed their reply. Two days later the government filed a supplemental response, contesting the standing of Bell and Hender-

[3] This motion challenged the veracity of the statement, contained in the affidavit supporting the search warrant, that Henderson had telephoned Thornton's Watsonville address from a hotel in Ohio shortly after purchasing precursor chemicals.

son to challenge the search of the Watsonville laboratory (*ibid.*). Upon receipt of all the pleadings the court scheduled a hearing for March 25, 1981, and the motions were argued on that date (J.A. 2, 28, 39-55).[4]

b. At the hearing on March 25, 1981, the district court was presented with nine discrete constitutional and evidentiary issues that had been addressed in the pleadings.[5] In addition, petitioners suggested at the hearing that the case should be dismissed because of what they alleged to be outrageous government conduct (J.A. 39-43). Petitioners did not present any

[4] The government filed its response to Henderson's separate motion to suppress on February 17, 1981 (J.A. 2, 28).

[5] Those issues were: whether law enforcement agents violated the Fourth Amendment when they monitored the beeper signals in California (presented in petitioners' joint motion of November 3, 1980); whether law enforcement agents violated the Fourth Amendment when they monitored the beeper signals in Ohio and Kentucky (presented in Henderson's motion of November 3, 1980); whether the warrant supporting the search of the Watsonville laboratory was defective (presented in petitioners' joint motion of November 3, 1980, Henderson's motion of November 3, 1980, and petitioners' supplemental memorandum of November 24, 1980); whether Thornton's arrest was defective (presented in petitioners' joint motion of November 3, 1980); whether Henderson's arrest was defective (presented in Henderson's motion of November 3, 1980); whether statements were obtained from Henderson in violation of the Sixth Amendment (presented in Henderson's motion of November 3, 1980); whether the identity of government informants should be revealed (presented in petitioners' motion of January 13, 1981); whether a co-defendant could join in petitioners' suppression claims (presented in Bell's motion of February 13, 1981); and whether Henderson and a co-defendant had standing to contest the search of the Watsonville laboratory (presented in the government's supplemental response of March 4, 1981).

evidence in support of these claims at the hearing, however, agreeing instead that further investigation would have to be undertaken (J.A. 39-55). And petitioners, after advising the court that Thornton's attorney was about to begin a three-month trial, requested that further proceedings in this case be postponed pending completion of that trial (J.A. 51-52).

In light of these developments, it was "apparent" to the district court that "before a final decision on the suppression motion could be made, additional information about telephone calls which were part of the basis of the search warrant aff[i]davit had to be obtained" (J.A. 28-29). The court accordingly directed the government to provide information relating to the telephone records to petitioners and to the district judge (J.A. 50, 53, 54-55). Similarly, the court deferred consideration both of petitioners' motion for disclosure of informant identities and their related contentions relating to government misconduct, pending the submission of additional information by the government (J.A. 43; see J.A. 29). And the court indicated that it would review the materials already submitted before seeking further briefing from the defendants on the standing of Henderson and Bell to contest the Watsonville search (J.A. 54).[6]

c. Approximately one month after completion of the hearing, on April 29, 1981, the prosecutor provided the court and defense counsel with information about the government's informant (J.A. 2, 14-17). Some two months later, on June 25, 1981, the prosecutor provided the parties with the telephone toll records that defense counsel had requested at the March hearing (J.A. 2, 18-19). The prosecutor noted in her

[6] The court took Henderson's Sixth Amendment motion under submission at the March 25, 1981 hearing (J.A. 51).

letter to defense counsel that the delay in providing the records was caused by "numerous unsuccessful efforts to obtain copies" of the telephone toll records from the Ohio motel at which Henderson had stayed when he purchased the precursor chemicals (J.A. 18). Defense counsel responded the following month, on July 6, 1981, by challenging the data supplied by the government and advancing additional claims of misrepresentation in the search warrant affidavit (J.A. 20-21, 29-30). Additional material regarding the toll records, including several legal memoranda and affidavits, were filed by both sides in August, September and November 1981 (J.A. 18-19).[7]

Meanwhile, on October 23, 1981, petitioners filed another memorandum in support of their suppression motions, raising a new claim: that the asserted destruction of the barrel of chemicals in which the beeper had been hidden denied them due process (J.A. 3, 30). The government responded to this motion on November 25, 1981, explaining that the barrel had not in fact been destroyed (J.A. 3, 31). Petitioners filed a final memorandum of law on December 12, 1981, taking issue with the government's representations about the barrel (*ibid.*); the government filed its response three days later (*ibid.*). On that date—

[7] On August 18, 1981, the government filed an affidavit by a Drug Enforcement Administration agent confirming the representations made in the June 25 letter (J.A. 2, 29). On September 14, 1981, petitioners filed a supplemental memorandum supporting their July 6, 1981 assertion of an additional misrepresentation in the search warrant affidavit; petitioners attached an affidavit from a telephone company employee purporting to support their claim (J.A. 3, 30). On November 10, 1981, the government responded to this claim, attaching an affidavit from the same telephone company employee repudiating her earlier statement (*ibid.*).

December 15, 1981—the district court took the motions under advisement (J.A. 31). It denied the suppression motion 34 days later, on January 19, 1982.[8] See J.A. 34 n.1.

3. On July 23, 1982, petitioners moved to dismiss the indictment on speedy trial grounds, challenging the excludability of the period after the filing of their first suppression motion on November 3, 1980. The district court denied the speedy trial motion, explaining that "the bulk of the continuances granted * * * were due to (1) the complexity of the issues presented in the case and difficulties in securing and assimilating crucial evidence; (2) resolution of numerous pretrial motions; and (3) numerous scheduling conflicts among the various counsel involved." J.A. 24-25.

The court explained that the "speedy trial clock" began running on September 3, 1980, when the superseding indictment was returned (J.A. 25).[9] But the

[8] On January 25, 1982, the government moved the district court to set the case for trial (J.A. 31). At a status hearing on February 3, 1982, however, petitioners' counsel informed the court that they intended to file a motion for reconsideration on the suppression issues. With the consent of all counsel, the court accordingly continued the case until April 21, 1982. *Ibid.* Petitioners filed their motion for reconsideration on March 23, 1982; after an evidentiary hearing on May 10, 1982, the court denied the renewed motion, as well as all other pending motions (J.A. 32). The court also set a trial date of September 13, 1982, noting that the delay was necessitated by difficulties in "coordinat[ing] the schedules of five defense attorneys and the attorney for the government" (*ibid.*).

[9] Normally, the return of a superseding indictment does not restart the 70-day clock. 18 U.S.C. 3161(h)(6); *United States* v. *Rush*, 738 F.2d 497, 510-511 (1st Cir. 1984), cert. denied, No. 84-685 (Feb. 25, 1985); *United States* v. *Horton*, 676 F.2d

court found that the period from November 3, 1980, when petitioners filed the first of their suppression motions, through March 25, 1981, when a hearing on the motions was held, "is automatically excludable under [18 U.S.C.] § 3161(h)[(1)](F)" (J.A. 28), which provides that a court "shall" exclude for speedy trial purposes "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." [10] The court added that "March 25 cannot be considered the point at which these matters were finally placed before the court for decision," given "the court's anticipation of the filing of additional materials" (J.A. 29); instead, "[i]n light of the fact that the last relevant filing was not received until December 15, 1981," the court found that "the motions were not submitted" until that date (J.A. 31). Citing 18 U.S.C. 3161(h)(1)(J), the

1165, 1170 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983). In this case, however, a new defendant, Peter Bell, was added in the superseding indictment. Thus, as to him the 70-day period began with the return of the superseding indictment. Under Section 3161(h)(7), a single speedy trial clock is used for all defendants who are joined for trial. *United States* v. *Carey*, 746 F.2d 228, 231 (4th Cir. 1984), cert. denied, No. 84-1272 (Mar. 4, 1985); *United States* v. *Dennis*, 737 F.2d 617, 620-621 (7th Cir. 1984), cert. denied, No. 84-5267 (Oct. 1, 1984); *United States* v. *Van Brandy*, 726 F.2d 548, 551 (9th Cir. 1984), cert. denied, No. 83-6945 (Oct. 1, 1984). Accordingly, as the district court explained, once Bell was joined with petitioners in the superseding indictment, their 70-day period also had to be measured with respect to the superseding indictment so that their clock and Bell's would run simultaneously (J.A. 25).

[10] The court also explained that the period from October 22, 1980, through November 12, 1980, was excludable because covered by a continuance (J.A. 25-26).

court excluded the next 30 days, through January 15, 1982, as a period during which the motions were "under advisement" (J.A. 31). While the clock then began running again, the court reasoned that it stopped on January 25, 1982, when the government filed a motion for a trial date, and the court found that the time from that day through the commencement of trial also was excludable.[11]

In all, the court found that no more than 66 days of nonexcudable time had elapsed (J.A. 34).[12] Because the Act requires dismissal only if more than 70

[11] The court explained that the period between January 25 and May 10, 1982—when a trial date was set—was excludable on alternative grounds: because the government's motion to set a trial date was pending during that period, and because the "[t]ime for setting the date was put off due to the representations of defense counsel that they wanted time to file a motion to reconsider." The court also found the period between May 10, 1982, and the trial date to be excludable because the delay followed from "[t]he unavailability of various defense counsel." J.A. 31-34.

[12] Viewing petitioners' claim in the most favorable light, the district court assumed that the 48-day period from September 3, 1980 through October 22, 1980 (when a continuance was granted) was nonexcludable (J.A. 26). The court also explained that the four days between January 15, 1982 (when the 30-day "under advisement" period of 18 U.S.C. 3161(h)(1)(J) expired) and January 19, 1982 (when the court denied petitioners' motion to suppress) were nonexcludable (J.A. 31); it likewise held the five days between January 19, 1982 and January 25, 1982 (when the government filed a motion to set the case for trial) to be nonexcludable (*ibid.*). And the court evidently reasoned that the nine-day period from January 25, 1982 through February 3, 1982 would be nonexcludable if the government's motion to set the case for trial did not toll the running of the statute (J.A. 34). In all, this meant that no more than 66 days were not excludable. See Pet. App. A6.

nonexcludable days have passed between arraignment or indictment and trial, the district court denied petitioners' motion.

4. The court of appeals rejected petitioners' challenge to the district court's speedy trial ruling, relying in relevant part on the pretrial motion exclusion of 18 U.S.C. 3161(h)(1)(F). In particular, the court of appeals declined petitioners' invitation (see Pet. App. A7) to read a "reasonable necessity" limitation into Section 3161(h)(1)(F).

The court explained that the statute in terms "excludes delays resulting from pretrial motions without qualification" (Pet. App. A9). Indeed, the court noted that Congress expressly made the excludability of *other* delays turn on reasonableness (*id.* at A9-A10), while indicating that abuse of the pretrial motion exclusion should be curbed through local guidelines (*id.* at A10-A11). The court also found that a "reasonable necessity" limitation would lack the precision that is needed for the Act to function: "It is important that the court and the parties know when the clock stops running under the Act," and "[i]t is even more important that they know when it starts again" (*id.* at A12). The court of appeals accordingly refused to "write conditions into the provision that would pressure trial courts to give short shrift to pretrial litigation, under the threat of dismissal of criminal indictments" (*id.* at A13).[13]

---

[13] Judge Ferguson dissented (Pet. App. A26-A34), maintaining that "[t]he majority opinion sets the Speedy Trial Act on its head and will allow trial judges to delay ruling on pretrial motions indefinitely" (*id.* at A26). He found support for his view in the decisions of other circuits (see *id.* at A29-A32) and in the Act's legislative history (*id.* at A32-A33).

SUMMARY OF ARGUMENT

A. Under the Speedy Trial Act of 1974, a criminal trial must commence within 70 days of the defendant's indictment or first appearance with counsel, whichever last occurs. That 70-day period is tolled, however, by the filing of a pretrial motion. 18 U.S.C. 3161(h)(1)(F). The question here is when the exclusion triggered by petitioners' pretrial motions *ended*, thus permitting their 70-day speedy trial clock to again begin ticking. In our view, the answer to that question is clearly provided by the Act: the exclusion remained in effect until the court received everything that it expected to obtain from the parties before issuing a ruling.

1. As the court below recognized, Section 3161(h)(1)(F) in terms excludes "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." At least where a hearing is held on a motion, the statute could not speak more clearly: it excludes without qualification the entire period between the filing of the motion and the conclusion of the hearing. And an examination of the other provisions of the Act confirms that Congress meant what it said in Section 3161(h)(1)(F).

Like the pretrial motion exclusion, most of the excludable periods enumerated in Section 3161(h) encompass "[a]ny period of delay" resulting from a given event. See 18 U.S.C. 3161(h)(1)(A)-(E), (G) and (I); 18 U.S.C. 3161(h)(2), (4), (5) and (8). In contrast, Congress placed absolute limits on the length of several other speedy trial exclusions (see 18 U.S.C. 3161(h)(1)(J) and Pub. L. No. 98-473, § 1219, 98 Stat. 2167 to be codified at 18 U.S.C.

3161(h)(9)), and in Section 3161(h)(7) it made use of the very reasonableness limitation contended for by petitioners here. Against this background, "[i]t is clear that Congress knew how to provide for" limited exclusions when it wanted to do so (*United States* v. *Rojas-Contreras*, No. 84-1023 (Dec. 16, 1985), slip op. 4); its failure to place such a limitation in Section 3161(h)(1)(F) should be dispositive.

2. Against this background, petitioners make only one attempt to find ambiguity in the language of Section 3161(h)(1)(F). Noting that the Act excludes the period prior to a hearing on "or other prompt disposition of" a pretrial motion, they contend that Section 3161(h)(1)(F) imposes a promptness requirement on the timing of pretrial hearings. But this reading is flawed on its face. Section 3161(h)(1)(F) is written in the disjunctive; the term "prompt" applies only to motions that terminate in "other * * * disposition[s]," rather than in hearings.

In any event, even for motions decided on the papers, Section 3161(h)(1)(F)'s reference to promptness does not place an undefined reasonableness cap on the length of the pretrial motion exclusion. Instead, that reference was designed to work in conjunction with Section 3161(h)(1)(J)—which excludes a maximum of 30 days after a court takes a motion "under advisment"—to prevent courts from indefinitely postponing the resolution of pretrial motions by declining to rule on them. As Congress explained, the under advisement exclusion (and its concomitant 30-day cap) goes into effect when the court receives all of the papers and evidentiary materials necessary for its ruling. H.R. Rep. 93-1508, 93d Cong., 2d Sess. 33 (1974). By insisting on a "prompt disposition" of pretrial motions, Congress intended to provide that the Section 3161(h)(1)(F) exclusion

would run only until the motion is taken under advisement; at that point, the court would have 30 excludable days in which to issue a ruling. S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979).

3. Petitioners also suggest that a literal reading of Section 3161(h)(1)(J) should terminate the pretrial motion exclusion at the moment that the hearing ends. But it hardly would have been sensible for Congress to have excluded automatically all time prior to the hearing on a motion—as well as the first 30 days after the motion is taken under advisement with the filing of the final post-hearing papers—while permitting the speedy trial clock to run down during the intervening period, during which the court remains unable to rule because awaiting the submission of additional materials. Recognizing this, the Judicial Conference and the courts of appeals have concluded that the pretrial motion exclusion must continue in effect until a motion is taken under advisement. And this conclusion is supported by the general language of Section 3161(h)(1), which excludes (emphasis added) "[a]ny period of delay resulting from other proceedings concerning the defendant, *including but not limited to*" the particular exclusions enumerated in Section 3161(h)(1)(A)-(J). To the extent that post-hearing delay prior to the point at which the motion is taken under advisement does not fall squarely within the language of Section 3161(h)(1)(F), it thus is automatically excludable under the broad language of Section 3161(h)(1).

B. The legislative history of the Act supports the conclusion that Congress meant precisely what it said in Section 3161(h)(1)(F): the pretrial motion exclusion was not intended to have a "reasonable necessity" cap. The current version of the pretrial motion

exclusion was inspired by speedy trial guidelines issued by the Second Circuit Judicial Council early in 1979, which flatly excluded all motion-related pretrial delay through the date of any post-argument submission. In contrast, Congress rejected a proposal by the Judicial Conference that would have permitted the exclusion only of delays that were "reasonably necessitated" by certain events.

Indeed, Congress was aware of the breadth of the exclusion created by Section 3161(h)(1)(F). It acknowledged that the exclusion could be abused and could, in fact, "undermine the whole Act." S. Rep. 96-212, *supra*, at 34. But Congress did not respond to this danger by adding a "reasonable necessity" limitation to the statute. Instead, it indicated that abuse of the exclusion was to be curbed by circuit and district court guidelines relating to motions practice. *Ibid.*; H.R. Rep. 96-390, 96th Cong., 1st Sess. 10 (1979). Congress thus intended Section 3161(h)(1)(F) to establish rigid starting and ending points for the running of the pretrial motion exclusion; it was left to the courts to ensure that the period between the two is not excessive.

C. This use of rigid starting and stopping points for the speedy trial clock is compelled by the policy of the Act. Unless those points are precise and easily discernible, the parties and the court will be unable to know as each day passes whether to count that day toward the 70-day limit. In such circumstances, the parties would not know when trial had to be scheduled. They would be unable to establish realistic prosecutorial and trial priorities. The result would be unwitting violations of the Act's 70-day limit, and the unnecessary dismissal of indictments.

A "reasonable necessity" limitation, however, simply cannot be applied in a precise or predictable manner. Because the speedy trial clock may start running at any point under such a standard, the parties and the court never would know where they stood. And this problem is compounded because a finding that a particular delay was not "necessary" must be made retrospectively. The unforeseeable—and thus unavoidable—dismissal of indictments that would follow from such an approach could serve no purpose. The prospect of such dismissals, moreover, would likely lead courts to give pretrial motions unjustifiably short shrift, a result that would serve the interests neither of defendants nor of the public.

D. Finally, it should be noted that petitioners cannot prevail even under their interpretation of the Act, because the time consumed by the district court was in fact reasonably necessary to dispose of the pretrial motions (mostly filed by petitioners themselves) in this case. Prior to the hearing on March 25, 1981, petitioners submitted several complex motions and a host of supplementary papers, and sought two lengthy postponements. In these circumstances—where petitioners' counsel took no steps to advance the hearing date and in fact were unavailable or unprepared for scheduled hearings, and where petitioners advanced several motions in seriatim fashion—the delay in holding a hearing hardly can be termed unreasonable. Similarly, most of the delay after the March 25, 1981 hearing was spent gathering factual materials necessary for the resolution of petitioners' motions. In light of this history, the simple fact that petitioners launched an especially vigorous and time-consuming pretrial attack should not lead to the dismissal of the indictment: "The Act was not, after all, meant to provide defendants with tactics for

ensnaring the courts into situations where charges would have to be dismissed on technicalities." *United States* v. *Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

ARGUMENT

I. THE PRETRIAL MOTION EXCLUSION RUNS FROM THE FILING OF A PRETRIAL MOTION UNTIL THAT MOTION IS TAKEN UNDER ADVISEMENT

Under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, as amended in 1979, a criminal trial must commence within 70 days of the defendant's indictment or first appearance with counsel, whichever last occurs. 18 U.S.C. 3161(c)(1). See *United States* v. *Rojas-Contreras*, No. 84-1023 (Dec. 16, 1985), slip op. 3. That 70-day period, however, is not counted in consecutive calendar days. Instead, certain triggering events result in the automatic exclusion of time from the 70-day speedy trial computation. 18 U.S.C. 3161(h)(1)-(7). One such event is the filing of a pretrial motion. 18 U.S.C. 3161(h)(1)(F). See *United States* v. *Stafford*, 697 F.2d 1368, 1371-1372 (11th Cir. 1983); *United States* v. *Cobb*, 697 F.2d 38, 41-42 (2d Cir. 1982); *United States* v. *Brim*, 630 F.2d 1307, 1312 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981).

The question here is when the exclusion triggered by petitioners' pretrial motions *ended*, thus permitting their 70-day clock to again begin ticking. In our view, the Act provides a simple answer to this question. The language of the pretrial motion provision, Section 3161(h)(1)(F), excludes the entire period from the filing of a motion through the date on which the court receives everything that it expects to obtain from the parties before reaching a decision—

whether that occurs at a hearing, with the submission of post-hearing briefs or evidentiary materials, or without a hearing ever having been held. At that point, the separate "under advisement" exclusion defined by Section 3161(h)(1)(J) comes into play, excluding an additional 30 days during which the court considers its ruling. This reading of the statute, which creates a sensible and manageable system for the administration of the speedy trial process, is the only one that can be reconciled with the language, legislative history, and policy of the Act.

A. The Language Of 18 U.S.C. 3161(h)(1)(F) Excludes The Entire Period Between The Filing Of A Motion And The Date On Which The Motion Is Taken Under Advisement

1. Petitioners assert that the pretrial motion exclusion is bounded by a "reasonable necessity" limitation; in their view, the exclusion triggered by their pretrial motions terminated at the point when the time "reasonably necessary" to hold a hearing had passed (Pet. Br. 12-17). As the court below recognized, however, this submission is inconsistent with the language of the Act. Section 3161(h)(1)(F) [hereinafter cited as Subsection (F)] flatly excludes "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." [14] At least where a hearing

---

[14] In excluding delay "resulting from" pretrial motions, Congress did not intend courts "to determine the reality of whether or not a particular proceeding interfered with the commencement of trial." *Cobb*, 697 F.2d at 42 (footnote omitted). Instead, it indicated that the exclusion should be "automatic" once the triggering event—here, the filing of a motion—occurs. S. Rep. 96-212, 96th Cong., 1st Sess. 26, 33, 34 (1979). Compelling practical considerations also support this conclusion: as

is held on a motion, the statute could not speak more clearly: Subsection (F) "by its terms excludes without qualification the entire period between the filing of the motion and the conclusion of the hearing." *Stafford*, 697 F.2d at 1373. See *United States* v. *Schuster*, No. 84-4705 (5th Cir. Nov. 26, 1985), slip op. 1350; *United States* v. *Mastrangelo*, 733 F.2d 793, 796 (11th Cir. 1984); *United States* v. *Horton*, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983); Pet. App. A9.[15]

An examination of the other provisions of the Act confirms that Congress's omission of a "reasonable necessity" qualification from Subsection (F) was deliberate. Like the pretrial motion exclusion, most of the excludable periods enumerated in Section 3161(h) encompass "[a]ny period of delay resulting from" a given event. The Act excludes, for example,

---

the lower courts have recognized, determining whether the filing of a given pretrial motion in fact delayed the commencement of trial "frequently would pose more difficult issues than the trial itself and in some cases would be simply impossible to determine" (*Cobb*, 697 F.2d at 42 n.6), while "resulting [in] uncertainty for defendants as to their Speedy Trial status." *Stafford*, 697 F.2d at 1371. For these reasons, the courts of appeals uniformly have held that the pretrial motion exclusion is not limited to delay that may be causally traced to the filing of a motion. See *ibid.* (citing cases); *Cobb*, 697 F.2d at 41-42; *Brim*, 630 F.2d at 1312-1313.

[15] Several courts of appeals have read a "reasonable necessity" limitation into Subsection (F). *United States* v. *Ray*, 768 F.2d 991, 998-999 (8th Cir. 1985); *United States* v. *Mitchell*, 723 F.2d 1040, 1047 (1st Cir. 1983); *United States* v. *Janik*, 723 F.2d 537, 543 (7th Cir. 1983); *United States* v. *Novak*, 715 F.2d 810, 818, 819-820 (3d Cir. 1983), cert. denied, 465 U.S. 1030 (1984); *Cobb*, 697 F.2d at 44. The reasoning of these decisions is discussed below. See notes 16, 27, *infra*.

all of the time consumed by an interlocutory appeal, be that two weeks or two years. 18 U.S.C. 3161(h)(1)(E). Cf. *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986) (addressing Sixth Amendment's Speedy Trial Clause). It similarly excludes without limitation all delay resulting from a competency examination (18 U.S.C. 3161(h)(1)(A)) or from the defendant's unavailability (18 U.S.C. 3161(h)(3)(A)). And if the government dismisses the original indictment with time remaining on the speedy trial clock, the clock does not resume ticking until a superseding indictment is returned—even if that occurs years later. 18 U.S.C. 3161(h)(6). Cf. *United States* v. *MacDonald*, 456 U.S. 1, 7 & n.7 (1982). See also 18 U.S.C. 3161(h)(1)(B), (C), (D), (G) and (I); 18 U.S.C. 3161(h)(2), (4), (5) and (8).

In contrast to those unqualified provisions, Congress placed absolute limits on the length of certain other speedy trial exclusions. The Act thus excludes only 30 of the days during which a pretrial motion or other proceeding concerning the defendant is under advisement by a court (18 U.S.C. 3161(h)(1)(J)), and excludes only one year of any delay that follows from an official request for evidence in a foreign country. See Pub. L. No. 98-473, § 1219, 98 Stat. 2167 to be codified at 18 U.S.C. 3161(h)(9). Indeed, the Act in Section 3161(h)(7) makes use of the very reasonableness limitation contended for by petitioners here, excluding a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

Against this background, "[i]t is clear that Congress knew how to provide for" limited exclusions when it wanted to do so (*Rojas-Contreras*, slip op. 4); its failure to place such a limitation in Subsection

(F) should be dispositive. Cf. *ibid.*; *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981). At a minimum, then, the Act cannot be read so as to make nonexcludable any portion of the period from the filing of a pretrial motion through the completion of the hearing on that motion.

2. Petitioners attempt, however, to give the Act just such a reading; while Subsection (F) in terms admits of no exceptions, it evidently is "not clear enough to preclude human ingenuity from creating ambiguity." *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 92 (1958) (Frankfurter, J., dissenting). For their part, petitioners make one valiant attempt to inject ambiguity into the language of the statute. Noting that the Act excludes the period prior to a hearing on "or other prompt disposition of" a pretrial motion, they suggest (Pet. Br. 12) that Subsection (F) imposes a promptness requirement on the timing of pretrial hearings. If a hearing is not held promptly, in their view, all of the time after the hearing should have been held becomes nonexcludable.[16]

This reading, however, is flawed on its face. Subsection (F) is written in the disjunctive; the term "prompt"—to the extent that it imposes a discernible limit on the pretrial motion exclusion at all—applies only to motions that terminate in "other * * * disposition[s]," rather than to motions that are submitted following a hearing. See *Stafford*, 697 F.2d at 1373 n.4; *United States* v. *Janik*, 723 F.2d 537, 550 (7th Cir. 1983) (Flaum, J., concurring in the result). Congress itself confirmed this seemingly self-evident proposition at the time that it put Subsection (F) in its current form (and inserted the prompt disposition term in the statute), explaining that the prompt disposition language "is intended to provide a point at which time will cease to be excluded, *where motions are decided on the papers filed without hearing.*" S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979) (emphasis added).

In any event, even for motions decided on the papers, Subsection (F)'s reference to promptness does not place an undefined reasonableness cap on the length of the pretrial motion exclusion. Instead, it was designed to work in conjunction with Section 3161(h)(1)(J) [hereinafter cited as Subsection (J)], the "under advisement" exclusion, to prevent courts from indefinitely postponing the resolution of pretrial motions by declining to rule on them.

Subsection (J) excludes from the speedy trial computation a maximum of 30 days during which "any proceeding concerning the defendant" (including a pretrial motion) is "under advisement." As Congress explained, and as the Judicial Conference has recognized, a motion is taken under advisement for purposes of Subsection (J) " 'after all oral argument is heard and all briefs have been submitted on the matter.' " H.R. Rep. 93-1508, 93d Cong., 2d Sess. 33 (1974) (citation omitted).[17] See Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended*

[16] Two of the courts of appeals that have adopted the "reasonable necessity" limitation similarly have relied on Subsection (F)'s reference to "other prompt disposition." *United States* v. *Janik*, 723 F.2d 537, 543 (7th Cir. 1983); *Cobb*, 697 F.2d at 43.

[17] The under advisement exclusion in the 1974 version of the Act was identical to the current version. See 18 U.S.C. (1976 ed.) 3161(h)(1)(G).

36 (rev. Dec. 1979, with amendments through Oct. 1984) [hereinafter cited as *Judicial Conference Guidelines*] (a motion is taken under advisement when the court receives "everything it expects from the parties before reaching a decision"). Subsection (F)'s promptness language was intended to ensure that the pretrial motion exclusion would not swallow the under advisement exclusion in cases in which the motion required no hearing, by permitting courts unlimited delay in ruling on motions after receiving all of the parties' papers. By insisting on a prompt disposition, Congress intended to provide that the pretrial motion exclusion would run only until the motion is taken under advisement; at that point, the court would have 30 excludable days in which to issue a ruling. The Senate Report thus flatly declared: "In using the words 'prompt disposition,' the Committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30-days, 'under advisement' provision contained in Subsection (h)(1)(J)." S. Rep. 96-212, *supra*, at 34.[19]

c. In the face of Subsection (F)'s unequivocal language, petitioners ultimately acknowledge (Pet. Br. 15-16) that a literal application of the statute should exclude the entire period between the filing of a motion and the hearing on that motion. Given this recognition, they offer an alternative approach: they contend (Pet. Br. 20-21) that the plain language of Subsection (F) terminates the pretrial motion ex-

[19] Indeed, even courts that make use of a "reasonable necessity" limit on the pretrial motion exclusion have recognized that "[t]he reference to 'other prompt disposition' is hortatory only." *Mitchell*, 723 F.2d at 1046.

clusion at the moment that the hearing ends. This proposed reading, however, is entirely without support and would play havoc with the statutory structure.

The pretrial motion provision was designed to exclude from the speedy trial computation all time that is consumed in placing the trial court in a position to dispose of a motion. Cf. S. Rep. 96-212, *supra*, at 9-10 (Section 3161(h)(1)-(7) exclude "specific and recurring periods of time often found in criminal cases"); H.R. Rep. 93-1508, *supra*, at 21 (Act's exclusion provisions reach "hearings, proceedings and necessary delay which normally occur prior to the trial"). Yet as the facts of this case demonstrate (see pages 39-41, *infra*), courts occasionally find it impossible to resolve motions until post-hearing briefs or additional factual materials have been submitted. Cf. *United States* v. *Turner*, 725 F.2d 1154, 1160 (8th Cir. 1984); *United States* v. *Bufalino*, 683 F.2d 639, 645 (2d Cir. 1982). It hardly would have been sensible for Congress to have excluded automatically all time prior to the hearing on a motion—as well as the first 30 days after the motion is taken under advisement with the filing of the final post-hearing papers—while permitting the speedy trial clock to run down during the intervening period, at which point the court remains unable to rule because it is awaiting the submission of additional materials. Indeed, reading the Act to establish such a scheme would mean that Congress sharply and senselessly differentiated between motions decided on the papers, as to which the Subsection (F) exclusion runs until the motion is taken under advisement (see pages 23-24, *supra*), and motions on which hearings are held.

In fact, however, the statutory structure suggests that Congress did not have such a scheme in mind.

Subsection (F)'s "prompt disposition" language refers to the point at which a motion submitted on the papers is taken under advisement (or is decided); by suggesting that hearings are equivalent to "other" prompt dispositions, Congress indicated that the pretrial motion exclusion also should continue to run in cases involving hearings until the matter is finally taken under advisement. Normally, of course, that will occur at the close of the hearing, and Congress evidently legislated with that situation in mind. But motions are not invariably taken under advisement at that point. Recognizing this reality of trial court litigation, the Judicial Conference has advised that

> exclusion for delay resulting from pretrial motions be treated as ending at such time as the court has received everything it expects from the parties before reaching a decision—that is, such date as all anticipated briefs have been filed and any necessary hearing has been completed. Thereafter, the matter should be treated as "under advisement," and subject to the rules of subparagraph (J).

Judicial Conference Guidelines 35-36.[19] And the courts of appeals—even those that have imposed a reasonable necessity limitation on the pretrial motion exclusion—uniformly have agreed that the Subsection (F) exclusion continues in effect until the motion is taken under advisement. See *Schuster*, slip op. 1350; *United States* v. *Ray*, 768 F.2d 991, 998 (8th Cir. 1985); *United States* v. *Anello*, 765 F.2d 253, 256 (1st Cir. 1985); *United States* v. *Mers*, 701 F.2d 1321, 1336 (11th Cir.), cert. denied, 464 U.S. 991 (1983); *Cobb*, 697 F.2d at 43. See also *Mitchell*, 723 F.2d at 1047 & n.6; *Janik*, 723 F.2d at 543, 544; *Stafford*, 697 F.2d at 1373. Petitioners have offered no reason to disregard this authority.

[19] The Judicial Conference explained: "It may be noted that the Committee recommendation treats the 'conclusion of the hearing on' a pretrial motion as occurring only after receipt of any post-hearing submissions that may be permitted by the court. This is consistent with the treatment of post-hearing submissions under the Second Circuit guidelines, which were generally regarded favorably by the Congressional proponents of the 1979 amendments. [See page 30 & n.23, *infra*.] In light of the general purpose of the 1979 amendment to this paragraph, it would be anomalous to conclude that time for post-hearing submissions was not excludable." *Judicial Conference Guidelines* 36.

It should be added that this reading of Subsection (F) does not play fast and loose with the statutory language, as petitioners suggest (Pet. Br. 20-21). Section 3161(h)(1) (emphasis added) generally excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, *including but not limited to*" the particular exclusions enumerated in Subsections 3161(h)(1)(A)-(J). In placing this language in the Act, Congress was taking "pains to forestall the possibility that a desire to be instructively particular not be misinterpreted as exclusively inflexible" (S. Rep. 96-212, *supra*, at 10); the list of exclusions is thus explicitly "'not intended to be exhaustive.'" *Ibid.* (citation omitted). And the post-hearing filing of briefs and evidentiary materials relating to a pretrial motion is, of course, a "'proceeding[] concerning the defendant.'" Indeed, until the moment that a motion is taken under advisement, pre- and post-hearing delay are in all relevant respects identical: both involve the use "'of procedures of which a defendant might l[e]gitimately seek to take advantage for the purpose of pursuing his defense'" (*ibid.* (citation omitted)), and both encom-

pass periods in which delay is a consequence of the court's simple inability to issue a ruling. To the extent that post-hearing delay prior to the point at which the motion is taken under advisement does not fall squarely within the language of Subsection (F), it nevertheless is automatically excludable under the general language of Section 3161(h)(1).[20]

B. The Legislative History Of Section 3161(h)(1)(F) Demonstrates That Congress Did Not Intend To Impose A "Reasonable Necessity" Limitation On The Pretrial Motion Exclusion

Our reading of the language of Subsection (F) is not only the most natural interpretation, but is also confirmed by the legislative history. An examination of that history shows that Congress meant precisely what it said: the pretrial motion exclusion was not intended to have a "reasonable necessity" cap.

When originally enacted in 1974, the Act provided for arraignment within 10 days of indictment and

[20] The introductory language of Section 3161(h)(1), of course, does not permit courts to circumvent the specific limitations placed upon certain exclusions in Sections 3161(h)(1)(A)-(J). See page 21, *supra*. If a court finds that one of those limitations is unduly burdensome—if, for example, a court finds that it cannot resolve an unusually complex motion within the 30 days provided by Subsection (J)—it may in an appropriate case issue an "ends-of-justice" continuance pursuant to Section 3161(h)(8). See H.R. Rep. 93-1508, *supra*, at 33 (acknowledging the "prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court"). The general language of Section 3161(h)(1) thus makes a given period of delay excludable when that delay is of a sort that is not specifically addressed in Section 3161(h)(1)(A)-(J), but is similar in nature to the examples contained in those provisions.

trial within 60 days of arraignment. 18 U.S.C. (1976 ed.) 3161(c).[21] As in the current Act, the 60-day period could be expanded by excluding certain periods of delay. The pretrial motion provision of the original version of the Act was a very limited one, however, reaching only "delay resulting from hearings on pretrial motions." 18 U.S.C. (1976 ed.) 3161(h)(1)(E).

Like other provisions added to the Act in 1979 (see *Rojas-Contreras*, slip op. 4-5), the current pretrial motion exclusion was inspired by a set of guidelines interpreting the 1974 Act that were issued by the Second Circuit Judicial Council in early 1979. See Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* (Jan. 16, 1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) [hereinafter cited as *1979 Senate Hearings*]. Those guidelines took an expansive view of the pretrial motion provision, flatly excluding "the time beginning with the date the Court determines that written papers are required and ending with the date of oral argument (or the due date of any post-argument submission) or, if there is to be no oral argument, the due date of the reply papers." *Id.* at 398-399.[22] The guidelines also established a strict timetable for the filing of motions (*id.*

[21] In 1979 Congress replaced those requirements with the current 70-day speedy trial period. 18 U.S.C. 3161(c)(1).

[22] A similar approach was advocated by the Justice Department prior to the 1979 amendment of the Act; the Department proposed that the pretrial motion exclusion be expanded to encompass "delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon." *1979 Senate Hearings* 6.

at 398), and noted that the 1974 version of the Act's under advisement exclusion (which was identical to the current Subsection (J)) provided courts with an additional 30 excludable days in which to resolve motions (*id.* at 399).

Subsection (F) plainly was patterned on the Second Circuit guidelines, which it generally mirrors.[23] In contrast, Congress rejected a proposal by the Judicial Conference that would have permitted the exclusion only of delays that are "reasonably necessitated by" certain events, including "pretrial proceedings of unusual complexity." *1979 Senate Hearings* 11. See *id.* at 63 (statement of Judge Alexander Harvey II).[24]

Indeed, Congress was fully aware of the breadth of the pretrial motion exclusion created by Subsection (F), acknowledging that, "if basic standards for prompt consideration of pretrial motions are not de-

---

[23] The Senate Committee explained that "[t]he Second Circuit has interpreted the Act and its legislative history in a creative manner which preserves its objectives and specifically addresses most of the problems which have hindered its smooth implementation * * *. After careful reading, the Committee is of the opinion that the Second Circuit guidelines are worthy of consideration by all the districts as a model for future implementation, consistent with presently-contemplated changes. The Committee invites every circuit council and district chief judge to give them the closest attention possible." S. Rep. 96-212, *supra*, at 20. However, Congress expressly rejected one element of the guidelines (and of the Justice Department's legislative proposal (see note 22, *supra*)); it declined to make time spent in the preparation of motions automatically excludable. Instead, Congress indicated that, in complex cases, the need for preparation time may be the basis for the grant of a discretionary "ends-of-justice" continuance under Section 3161(h)(8). S. Rep. 96-212, *supra*, at 33-34.

[24] Congress explained that the Judicial Conference's pre-1979 approach to the Act "too often * * * ha[d] erred on the side of caution." S. Rep. 96-212, *supra*, at 20.

veloped, this provision could become a loophole which could undermine the whole Act." S. Rep. 96-212, *supra*, at 34. But Congress did not respond to this potential problem by adding a "reasonable necessity" limitation to the statute; instead, the House indicated that it adopted Subsection (F) "with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H.R. Rep. 96-390, 96th Cong., 1st Sess. 10 (1979). The Senate agreed that "the change the committee amendment makes with respect to the automatic exclusions for pretrial motions in (h)(1)(F) is an appropriate subject for circuit guidelines." S. Rep. 96-212, *supra*, at 34.[25]

Congress thus intended Subsection (F) to establish rigid starting and ending points for the running of the pretrial motion exclusion; it was left to the courts to ensure that the period between the two is not excessive.[26] By proposing that the Act itself place

---

[25] The Senate noted that "[m]any courts by local rule have either adopted an omnibus pretrial motions procedure, which requires consolidation of all such motions soon after arraignment, or they require the filing of pretrial motions within a specified number of days (often 10) after arraignment, although they need not be consolidated." S. Rep. 96-212, *supra*, at 34. As noted above, the Second Circuit guidelines—which Congress commended to the attention of the other courts (see note 23, *supra*)—made use of the second sort of procedure. While Congress expressed no preference between the two types of local rules (S. Rep. 96-212, *supra*, at 34), it plainly expected that circuit or district court guidelines, rather than the Act itself, would establish the "basic standards for prompt consideration of pretrial motions." See *Ibid.*

[26] Several courts of appeals that have read a "reasonable necessity" limitation into Subsection (F) have then exercised

a limitation on the length of the exclusion, petitioners would read into the statute a restriction that Congress consciously chose not to place there.[27]

---

their supervisory powers to require the district courts of the circuit to implement that standard. See *Ray*, 768 F.2d at 999; *Novak*, 715 F.2d at 820. While requiring compliance with the Act certainly is a proper subject for the exercise of an appellate court's supervisory powers (cf. *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985)) the recognition of a "reasonable necessity" limitation cannot be justified as an exercise of that power. As we explain below (at 33-36), the use of an undefined "reasonable necessity" limitation runs counter to the policy of the Act. And the remedy for a violation of the time limits contained in local court rules presumably would not be mandatory dismissal of the indictment, as is the case when the Act is violated.

[27] Petitioners point (Pet. Br. 12) to one element of the legislative history to support their argument: a snippet of the Senate Report that states, "[n]or does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary." S. Rep. 96-212, *supra*, at 34. Several courts of appeals that have adopted a "reasonable necessity" limitation also relied on this language. *Ray*, 768 F.2d at 998; *Mitchell*, 723 F.2d at 1047; *Novak*, 715 F.2d at 819-820; *Cobb* 697 F.2d at 43-44. Read in context, however, this statement—which appears at the end of the discussion of Subsection (F)—plainly was directed not at the meaning of Subsection (F) but at the policy the Senate expected to be embodied in the local court guidelines, which were to require the prompt scheduling of hearings. The Senate thus indicated that time should not be made "eligible for exclusion" through the postponement of hearings; it did not state that the postponement of hearings would terminate the exclusion. It should be added that the House Report, which refers to the necessity of effective local court rules, does not suggest that delay in the scheduling of hearings should terminate the exclusion. See H.R. Rep. 96-390, *supra*, at 10.

C. The Creation Of A "Reasonable Necessity" Limitation To The Pretrial Motion Exclusion Would Make Effective Application Of The Act Impossible

At bottom, petitioners appeal to the policy of the Act. "[T]he sense of the Speedy Trial Act," they declare, "is to ensure a speedy trial" (Pet. Br. 15), a result that in their view can be achieved only if a limit is placed on the length of the pretrial motion exclusion. But even leaving aside the question whether appeals to policy ever may overcome contrary language in a statute (see *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12), petitioners' analysis is flawed on its own terms. "The word speedy does not * * * denote assembly-line justice, but efficiency in the processing of cases which is commensurate with due process." H.R. Rep. 93-1508, *supra*, at 15. See S. Rep. 96-212, *supra*, at 19-20. The Act thus gives weight to interests in addition to expedition, and questions concerning its application cannot routinely be resolved by choosing the narrowest exclusions or the shortest time limits. This case presents a clear example of that principle.

There is little doubt that an essential aspect of the efficient and rational application of the Act is precision in its time limits: the Act cannot work unless the starting and stopping points of the speedy trial clock are precise and easily discernible. The parties (particularly, of course, the government) and the court must be able to know as each day passes whether to count that day toward the 70-day limit. If they were unable to do so, they would not know when they had reached or were approaching the last day on which trial could commence. They accordingly would not know when trial had to be scheduled.

They would not know whether it was necessary to seek an "ends-of-justice" continuance pursuant to Section 3161(h)(8). Courts and prosecutors would be unable to establish realistic priorities by identifying those cases that were so pressing as to require the immediate application of prosecutorial or judicial resources. The inevitable result would be unwitting violations of the Act's 70-day limit, and the unnecessary dismissal of indictments. 18 U.S.C. 3162(a)(2).

However superficially appealing a "reasonable necessity" limitation may appear, it suffers from the inescapable drawback that it simply cannot be applied in a precise or predictable manner. As the court below explained, "if the start [of the speedy trial clock] is to be at the point when the passage of time becomes 'unreasonable,' even if the period of delay mentioned in the statute has not expired, neither the court nor the parties can know where they stand" (Pet. App. A12-A13). And this problem is compounded because, as the Second Circuit has candidly acknowledged, "[u]nlike the determination that time will be excluded from the speedy trial clock based on the 'ends of justice,' * * * the finding that a particular time period was 'reasonably necessary' for the processing of a motion is by its nature retrospective." *United States* v. *Simmons*, 763 F.2d 529, 532 (1985). Yet once time has elapsed, neither the government nor the court can recapture it for speedy trial purposes if it is ruled excludable through a retrospective determination.[28]

[28] For this reason, an excludable "ends-of-justice" continuance cannot be revoked after the period of the continuance has expired. *United States* v. *Carlone*, 666 F.2d 1112 (7th Cir. 1981), cert. denied, 456 U.S. 991 (1982).

The problems caused by this type of system already are visible in the circuits that have created "reasonable necessity" limitations. Petitioners assert (Br. 16) that the limitation has been applied successfully by those courts. In fact, however, the decisions cited by petitioners simply engaged in (or directed the district courts to engage in) post hoc attempts to determine whether motions could have been disposed of more expeditiously. See *Simmons*, 763 F.2d at 532, on remand, No. 84-CR-213 (S.D.N.Y. Sept. 17, 1985), appeal pending, No. 85-1359 (2d Cir.) (remanding for a reasonable necessity determination; district court's determination that delay *was* reasonably necessary now under appeal); *United States* v. *Ray*, 768 F.2d 991 (8th Cir. 1985), after remand, No. 84-2230 (8th Cir. Nov. 15, 1985) (remanding for reasonable necessity determination, and on appeal from the district court's determination that the delay was *not* reasonably necessary); *United States* v. *Brown*, 736 F.2d 807, 809-810 (1st Cir. 1984), aff'd, 770 F.2d 241 (1st Cir. 1985) (remanding for a reasonable necessity determination, and affirming the district court's decision to dismiss the indictment (without prejudice) because the delay was *not* reasonably necessary); *Janik*, 723 F.2d at 549 (remanding for a reasonable necessity determination); *Cobb*, 697 F.2d at 46 (same). This approach, which leads to the unforeseeable—and thus unavoidable—dismissal of indictments, is hardly a sensible way in which to administer the Act.[29]

[29] Petitioners also point to Section 3161(h)(7), which excludes a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run," as an example of an exclusion containing a reasonableness limitation that has been employed "with no

Petitioners' approach also would have other consequences that would disserve the interests both of defendants and of the public. As the enactment of Subsection (F) suggests, pretrial motions often present difficult legal and evidentiary issues that require "thoughtful consideration" by the court and the parties (Pet. App. A13). Cf. *Loud Hawk*, slip op. 10. Yet the prospect of dismissal of the indictment if the trial court later is deemed to have given the parties too much time to file their legal and evidentiary materials may lead district courts to give pretrial motions unjustifiably short shrift. Conversely, if the court devotes what it believes to be an adequate amount of time to the presentation and consideration of a motion, " 'it would indeed be anomalous to permit the defendant to benefit from delay properly undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time.' " S. Rep. 96-212, *supra*, at 9.

---

apparent confusion" (Pet. Br. 16). In fact, however, most courts of appeals have ruled that an exclusion applying to one defendant automatically applies to all defendants; they have not made an independent determination whether the delay involved was reasonable. See, *e.g.*, *United States* v. *Carey*, 746 F.2d 228, 231 (4th Cir. 1984); *United States* v. *Dennis*, 737 F.2d 617, 620-621 (7th Cir. 1984); *Rush*, 738 F.2d at 503-504; *Mitchell*, 723 F.2d at 1048 (citing cases); *United States* v. *Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983); *United States* v. *Fogarty*, 692 F.2d 542, 546 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980). Cf. *United States* v. *Theron*, No. 85-2881 (10th Cir. Jan. 31, 1986), slip op. 8-9, 13.

II. THE DELAY IN THIS CASE WAS REASONABLY NECESSARY TO RESOLVE PETITIONERS' MOTIONS

Petitioner's challenge to the decision below rests entirely on the proposition that a "reasonable necessity" limitation should be placed on the pretrial motion exclusion. They evidently recognize that there was no violation of the Act in this case if the entire period between the filing of a motion and the time that it is taken under advisement is excludable. If the Court accepts our submission that a "reasonable necessity" limitation should not be read into Subsection (F), the decision below must be affirmed.

Even if the Act is interpreted as petitioners propose, however, they are not entitled to relief, because the time consumed by the district court was in fact reasonably necessary to dispose of the pretrial motions—mostly filed by petitioners themselves—in this case. In contending to the contrary, petitioners focus on two periods: that from November 3, 1980 through March 25, 1981, when a hearing was held on their suppression motions; and that from March 25, 1981 through September 14, 1981, when the filing of additional pleadings concededly created a new period of exclusion under Subsection (F) (Pet. Br. 3-4, 27-28).[30] We will address each of these periods in turn.

---

[30] Petitioners generally challenge the exclusion of the period from November 3, 1980 through January 19, 1982, when the district court ruled on their suppression motion (Pet. Br. 3-4). They elsewhere acknowledge, however, that their September 14, 1981 pleading tolled the running of the speedy trial clock (Pet. Br. 28 n.10). In addition, petitioners filed a due process motion on October 23, 1981, which created still another period of exclusion under Subsection (F). See page 8, *supra*.

1. Petitioners acknowledge that the speedy trial clock stopped on November 3, 1980, when they filed their first suppression motions; they contend that the trial court delayed consideration of these motions unnecessarily by failing to address them at a hearing until March 25, 1981. Tellingly, however, petitioners do not even attempt to identify the point at which the delay became unreasonable and at which, accordingly, the Subsection (F) exclusion should have ended. This omission, of course, points up the difficulty of applying a "reasonable necessity" limitation at all. And an examination of the record, in any event, demonstrates that the course followed in this case was entirely reasonable.

Petitioners' suppression motions were complex; they presented several Fourth and one Sixth Amendment issue. See page 4 & note 2, *supra*. A hearing on the motions was scheduled to commence some three weeks after they were filed, on November 26, 1980. Two days prior to the scheduled hearing, petitioners filed an additional pleading in support of their motions, raising a significant new evidentiary challenge to the government's warrant affidavit. The court accordingly rescheduled the hearing to January 28, 1981. Prior to that date, however, petitioners filed yet another motion (to reveal the identities of informants and other information),[31] while the attorney for one of the petitioners sought to delay the hearing until February 18, 1981. The hearing was rescheduled to that date to accommodate this request. Prior to the new hearing date, petitioners' codefendant filed a motion of his own. And on the hearing

[31] Had the Subsection (F) exclusion expired prior to this point, of course, the filing of this motion would have started a new exclusionary period.

date, petitioners were granted another postponement to permit them to respond to the government's papers. That response was filed on March 2, 1982, and the hearing was held some three weeks later, on March 25, 1982. See pages 4-6, *supra*.

Petitioners thus submitted at least four motions prior to the hearing date, only two of which were filed simultaneously. They also filed a host of supplementary papers, one of which advanced a significant new evidentiary argument. Petitioners themselves sought two lengthy postponements. Petitioners' final papers were submitted only three weeks before the hearing was held. In these circumstances—where petitioners' counsel took no steps to advance the hearing date (cf. *United States* v. *Snyder*, 707 F.2d 139, 142-143 (5th Cir. 1983)) and in fact were unavailable or unprepared on the scheduled hearing dates (cf. *Mitchell*, 723 F.2d at 1048), and where petitioners advanced several complex motions in seriatim fashion—the delay in holding a hearing hardly can be termed unreasonable.[32] Cf. *Anello*, 765 F.2d at 257 (155-day delay between filing of a motion and the hearing reasonably necessary); *Rush*, 738 F.2d at 503 (four-month delay between filing and hearing reasonably necessary).

2. The Subsection (F) exclusion, moreover, plainly did not terminate with the March 25, 1981 hearing because, as the district court itself noted, in no mean-

[32] Indeed, petitioners did not object when the district court indicated, on a minute entry docketed on March 31, 1981, that the entire period through March 25, 1981 was excludable. By local rule, petitioners had five days within which to object to the finding of excludability. See U.S. District Court, Northern District of California, *Plan for Prompt Disposition of Criminal Cases*, § II.6(b)(2)(i), at 11 (Apr. 7, 1980).

ingful sense can the court be said to have taken petitioners' motions under advisement on that date.[33] See page 7, *supra*. Instead, the court declined at the hearing to consider certain of petitioners' suppression claims, as well as their claim of prosecutorial misconduct, pending the submission of additional factual materials by the government (see page 7, *supra*)—a disposition that petitioners did not challenge. J.A. 43, 53. These materials were submitted in April and June.[34] Shortly afterwards, however, on July 6, 1981, petitioners contested the government's June submission, advanced a significant new evidentiary claim relating to the government's warrant affidavit, and requested an evidentiary hearing.[35] In August, September and November the government and petitioners filed additional evidentiary materials relating to the warrant affidavit. See pages 7-8, *supra*.

---

[33] The court did take Henderson's Sixth Amendment claim under advisement at that time (see note 6, *supra*)—an action that, as to that motion, commenced the running of a 30-day Subsection (J) exclusion.

[34] The prosecutor explained the delay in obtaining this material. The evidence relating to the government informant had been requested in several other districts (J.A. 41). And the prosecutor made "numerous" unsuccessful requests for the toll records requested by petitioners before obtaining them (J.A. 18). During this period, the prosecutor also was satisfying an informal request by petitioners for information relating to the beeper surveillance (J.A. 29). It may be added that petitioners evidently saw no need for greater expedition in obtaining the requested materials; they had informed the court at the March 25 hearing that counsel for Thornton would be unavailable for approximately three months (J.A. 51-52).

[35] An evidentiary hearing eventually was provided in May 1982, in connection with petitioners' motion for reconsideration of the denial of their suppression motions.

Two conclusions are evident from this recitation of the record. First, the district court plainly did not take petitioners' suppression motion (let alone all of their motions) under advisement at the March 25, 1981 hearing. The question presented in that motion involved hotly debated factual issues; the court was hardly in a position to decide it without the additional evidence submitted by the parties in the summer and fall of 1981.[36] And the delay occasioned by those filings was not unreasonable under any standard. Most of the period in question was spent gathering factual materials necessary for the resolution of petitioners' motions. Indeed, one of petitioners' attorneys candidly acknowledged during the argument on their speedy trial motion that the delay in this case was in large part petitioners' responsibility (J.A. 56). In light of this history, the simple fact that petitioners launched an especially vigorous and time-consuming pretrial attack should not lead to the dismissal of the indictment: "The Act was not, after all, meant to provide defendants with tactics for ensnaring the courts into situations where charges will have to be dismissed on technicalities." *Bufalino*, 683 F.2d at 646. Cf. *Loud Hawk*, slip op. 14.

---

[36] Indeed, while petitioners assert (Pet. Br. 28) that the motion must be deemed to have been submitted on July 6, 1981, when they challenged the accuracy of the government's filings, they fail to note that their July 6 submission itself raised a significant new evidentiary point. See page 8, *supra*. The court plainly required a response to this allegation from the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

FEBRUARY 1986

APPENDIX

§ 3161. Time limits and exclusions

* * * * *

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

* * * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate prep-

aration for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161 (b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been

made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

§ 3162. Sanctions

* * * * *

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20155

REPLY

BRIEF

No. 84-1744

In The
Supreme Court of the United States
October Term, 1985

THOMAS J. HENDERSON,
SCOTT O. THORNTON,
and RUTH FREEDMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DENISE ANTON
473 Jackson Street
San Francisco, CA 94111
(415) 986-5591

Counsel for Petitioner
Scott O. Thornton

ALEX REISMAN
861 Bryant Street
San Francisco, CA 94103
(415) 626-5134

Counsel for Petitioner
Ruth Freedman

PAUL G. SLOAN
407 Sansome Street
San Francisco, CA 94111
(415) 788-2200

Counsel for Petitioner
Thomas J. Henderson

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Petitioners believe that to exclude from computation of the time in which the instant case should have been brought to trial, the entire 407-day delay from the filing of petitioners' first pretrial motion to the point at which the trial court took all pretrial motions under submission, would be contrary to the plain language, legislative history and spirit of the Speedy Trial Act. The pretrial motion provision of the Speedy Trial Act, section 3161(h) (1) (F), excludes only such delay as is reasonably necessary for a fair processing of pretrial motions, and in no event excludes delay following a hearing on motions.

The government charges that petitioners' interpretation of subsection (F) is contrary to the plain language and legislative history of the Act. The government also takes the astounding position that an interpretation of subsection (F) which does not countenance unreasonable delay "runs counter to the policy of the Act." (Gov't. Brief 32, n.26). In the government's view, the pretrial motion excludes, without qualification, all delay from filing of a motion to the date on which the court receives everything it expects from the parties before reaching a decision. To paraphrase a recent pronouncement of this Court, the government's construction of the Speedy Trial Act ignores the plain language of the Act and would frustrate its basic purpose, which is manifest in its very title: the speedy trial of criminal cases. *United States v. Rojas-Contreras*, 474 U.S. —, 88 L.Ed.2d 537, 544 (1985).

ARGUMENT

I

A REASONABLENESS QUALIFICATION UPON THE PRETRIAL MOTION EXCLUSION OF SECTION 3161(h)(1)(F) IS SUPPORTED BY THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY AND PURPOSE OF THE SPEEDY TRIAL ACT.

A. The Plain Wording of Section 3161(h)(1)(F) Places a Prompt Limitation on the Pretrial Motion Exclusion.

The starting point in determining the intended meaning of a statutory provision is, of course, the language of the statute itself. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J. concurring); *United States v. Rojas-Contreras,* 88 L.Ed.2d at 542. The dispute herein concerns the proper interpretation of 18 U.S.C. § 3161(h) (1) (F). Subsection (F) excludes from the Speedy Trial Act computation, "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion".

Petitioners submit that this phrase is clearly structured so that "hearing" is equated with "prompt disposition"; it is a type of prompt disposition. Accordingly, the hearing, like any other disposition, must be prompt, or the exclusion does not apply.

The government all but concedes that the adjective, "prompt", applies to hearings as well as other dispositions. (Gov't. Brief 25-26). It argues, however, that prompt, as used in the statute does not mean prompt as it is commonly defined. Instead, prompt means the point at which all matters are under advisement. Accordingly,

a prompt hearing is not one that occurs expeditiously; it is one that ends only after all post-hearing briefs have been submitted—whenever that may be.

Words in a statute should ordinarily be given their common, contemporary meaning. *Perrin v. United States,* 444 U.S. 37, 42 (1979). Prompt has been defined as "performed readily or immediately: given without delay or hesitation". *Webster's Third New International Dictionary* (1961). The government submits no authority to support the conclusion that this definition of prompt should be rejected in favor of the government's creative interpretation of the word.

It may be, as the government states, that the prompt language was intended to ensure that courts do not delay ruling on motions after receiving all of the parties' papers. This does not mean, however, that Congress was not also counseling the parties to submit their papers promptly. To the contrary, it appears quite clear from the 1979 Senate Committee Report that this is exactly what Congress intended. The paragraph of the Senate Committee Report which discusses the prompt disposition language of subsection (F) ends with the following sentence:

> Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary.
>
> S.Rep. 96-212, 96th Cong., 1st Sess. 34 (1979) (hereinafter cited as *1979 Senate Report*).

Plainly, "prompt," even if it means all that the government suggests, also means *prompt*—no delay beyond what is reasonably necessary.

In urging the reasonably necessary qualification to the pretrial motion exclusion, petitioners have not, as the

government suggests, ingeniously found ambiguity in clarity. Petitioners have merely offered a workable means of implementing the prompt requirement found in the statutory language.

B. The Wording of Section 3161(h)(1)(H) Supports an Interpretation that All Exclusions Within Section 3161(h) Are Subject to a Reasonableness Qualification.

Pointing to the "reasonable delay" language of section 3161(h) (7), the government argues that Congress knew how to make a reasonableness qualification when it chose to; Congress' failure to include a reasonableness qualification in subsection (F) is evidence of its deliberate decision to exclude such a qualification. (Gov't. Brief 21-22). Other evidence, however, suggests that a reasonableness limitation is implicit in all of the exclusions within section 3161(h).

The automatically excludable time provisions of the Speedy Trial Act were made in recognition of the fact that there exist "specific and recurring periods of time often found in criminal cases" which are necessary for the fair adjudication of a case. S.Rep. No. 93-1021, 93rd Cong., 2d Sess. 9 (1974) (hereinafter cited as *1974 Senate Report*). Unreasonable delay is not one of those periods of time. This obvious point has led at least one commentator to conclude. "it is fairly clear from the Act itself that the delays within section 3161(h) must be reasonable delays." Misner, *Speedy Trial: Federal and State Practice*, §17-3.1 at p. 265 (1983).

In support of this position, Professor Misner points to the language of section 3161(h) (1) (H), which provides an exclusion for delay resulting from the transportation of a defendant. Subsection (H), like subsections (A) through (G) and (I), contains no reasonableness limitation. Nevertheless, subsection (H) provides that transportation delays in excess of ten days "shall be presumed unreasonable." This presumption is meaningless unless delay under subsection (H), and the other similarly worded subsections, must be reasonable.

C. The Legislative History of the Speedy Trial Act and Its 1979 Amendment Also Supports the Conclusion that Only Reasonable Delay Is Excludable Under Section 3161(h) (1) (F).

In search of legislative support for its argument that a reasonably necessary limitation runs counter to the policy of the Speedy Trial Act, the government points to congressional language cautioning, "if basic standards for prompt consideration of pretrial motions are not developed, it [Subsection (F)] could become a loophole which could undermine the whole Act." *1979 Senate Report* 34.

The government attempts to transform this disapproval of a broad interpretation of subsection (F) into support for such an interpretation by reasoning as follows: Congress recognized that subsection (F) was a potential loophole; Congress intended that excessive or abusive use of the exclusion be precluded by district or circuit guidelines; therefore. Congress did not place any restrictions of its own on the exclusion. The government's reasoning is flawed.

The fact that Congress intended the promulgation of local guidelines does not lead to an inescapable conclusion that Congress itself placed no prompt—or reasonable—cap on the exclusion. To the contrary, it makes perfect sense that Congress would want its "prompt" admonition strengthened through local guidelines.

Words such as "prompt" and "reasonable" offer only very general guidance regarding when a pretrial motion

should be filed, responded to, argued and submitted. Such general guidance may counsel against patently excessive use of the exclusion, but it by no means closes the potential loophole.[1] Local guidelines, such as those issued by the Judicial Council of the United States Court of Appeals for the Second Circuit are needed to accomplish this task. (*See 1979 Senate Report* 20, 33-34). The guidelines, however, are to develop the "basic standards for prompt consideration" mandated by the statutory language. (*See 1979 Senate Report* 34).

Legislative support for petitioners' position that unreasonable delay is not excludable is found in the Senate Committee Report statement cited above: "Nor does the Committee intend that additional time be made eligible for exclusion [pursuant to subsection (F)] by postponing the hearing date or other prompt disposition of the motions beyond what is reasonably necessary." *1979 Senate Report* 34.

The government gives short shrift to this "snippet," arguing in a footnote that this language, read in context, is directed at the policy to be imposed in local guidelines. (Gov't. Brief 32, n.27). There is absolutely no basis for such an interpretation of this language. The sentence is not found in the paragraph in which the promulgation of guidelines is discussed. It is located in the following paragraph of the Report in which the Committee discusses "other prompt disposition"—the very language petitioners submit compels the reasonably necessary limitation. *1979 Senate Report* 34.

---

[1] To appreciate this fact, one need look no farther than the government's argument herein that a prompt disposition requirement does nothing to hasten a hearing or submission of motions.

Legislative history also supports the general conclusion advanced by Professor Misner that all delay within subsection 3161(h) must be reasonable. As originally enacted in 1974, section 3161(h) (1) (A) excluded "delay resulting from an examination of the defendant, and hearing on, his mental competency, or other physical incapacity". Subsection 3161(h) (1) (B) excluded "delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code." No reasonable qualification appeared as to either of these exclusions. Nevertheless, the 1974 Senate Committee Report states:

> It is intended that an examination for mental competency or for narcotics addiction pursuant to the Narcotics Addict Rehabilitation Act (NARA), section 2902 of title 28 of the United States Code, should be treated the same as the hearing on these issues. Therefore, a *reasonable amount of time* actually consumed while the defendant is under physical or mental examination shall also be excluded in computing time. Of course, *it would still be inappropriate to exclude time spent at a hospital after the examination is complete or as a result of unreasonable delays* at the hospital awaiting examination.
>
> *1974 Senate Report* 36, 37-38 (emphasis added).

An implicit reasonableness qualification was anticipated even by those advocating expansion of the original "other proceedings" exclusions of section 3161(h)(1). In April, 1979, the Department of Justice submitted a bill to amend the Speedy Trial Act. Section 5 of the Justice Department bill proposed that section 3161(h)(1) be amended to expand the exclusion for examination for mental competency (subsection (A)), examination for narcotics addiction (subsection (B)); and pretrial motions (then subsection (E), now subsection (F)). 1979 Judicial Conference bill, *reprinted in The Speedy Trial Act Amendments of*

1979: *Hearings on S. 961 and S. 1028 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 9-15 (1979) (hereinafter cited as *1979 Senate Hearings*). The proposed expansion of the three exclusions included no reasonableness requirement. Nevertheless, in a prepared statement in support of this bill, Assistant Attorney General Philip B. Heymann stated:

> Section 5 will provide for exclusion of the time *reasonably necessary* for the processing of cases where the mental competency or physical capacity of the accused, or his eligibility for treatment under the Narcotic Addiction Rehabilitation Act, 28 U.S.C. 2902, is drawn in question.
>
> • • •
>
> Section 5 will also provide for the exclusion of all time *reasonably necessary* for and routinely required to make, respond to, contest and decide pretrial motions, thus avoiding unnecessary resort to and litigation under and about the exercise of authority under section 3161(h) (3).

1979 Senate Hearings 55 (emphasis added).

Petitioners submit that these references establish that Congress intended that only reasonable delay be excluded pursuant to 3161(h) (1) (F).[2] This conclusion is in no way discredited by the government's argument that because Congress urged the development of local guidelines to prevent abusive use of the exclusion, it could not have imposed a reasonable limitation of its own.[3]

---

[2] It should be noted that the *Judicial Conference Guidelines*, as amended November, 1984, now recognize that in some circumstances, the duration of the subsection (F) exclusion may be subject to a reasonableness requirement. Commission on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of The Speedy Trial Act of 1974 as amended*, p.37 (rev. Dec. 1979, with amendments through Nov. 1984) (hereinafter cited as *Judicial Conference Guidelines*).

[3] The government also points to the fact that Congress rejected a Judicial Conference proposal that would have per-

(Continued on following page)

D. A Reasonableness Qualification on the Pretrial Motion Exclusion Would Further the Undisputed Purpose of the Speedy Trial Act Without Being Unduly Burdensome to Apply.

It is a well-established canon of statutory construction that a single provision of a statute should not be interpreted so as to defeat the general purpose that animates and informs a particular legislative scheme. *See Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). Simply stated, "A statute should ordinarily be read to effectuate its purposes rather than frustrate them." *Motor Vehicle Manufacturers v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C.Cir. 1983). The purpose of the Speedy Trial Act is to ensure prompt disposition of criminal trials, and it is the interpretation of subsection (F) that best serves this purpose that should be adopted.[4]

In its rush to affirm judgment, the government glosses over the stated goal of the Act to concentrate on the need for precise cut-off points that will allow the parties to apply the exclusions in a predictable, indeed, mechanical fashion. Precise cut-off points may simplify the Speedy

---

(Continued from previous page)

mitted the exclusion only of delay "reasonably necessitated" by certain events. *1979 Senate Hearings* 11. The Judicial Conference proposal was more drastic than the government suggests. That proposal would have extended the time from indictment to trial to 120 days and eliminated entirely the automatic exclusion provisions of the Act. Rejection of such a proposal hardly evidences a rejection of a reasonably necessary limitation.

[4] In urging an interpretation of subsection (F) that would best serve the purpose of the Speedy Trial Act, petitioners are not asking the Court to substitute its judgment for that of Congress. Petitioners are simply asking the Court to attribute to Congress a general overriding intent to avoid results that would undermine or vitiate the purposes of its legislation.

Trial Act calculations; however, the intent and language of the Act cannot be sacrificed simply to achieve the easiest method of calculation. The Act necessarily involves some discretionary determinations.

Evidence that the Speedy Trial Act must and does work even where the starting and stopping points of the exclusions are not rigidly established can be found in the language of the Act itself. For example, Congress clearly intended that the prompt disposition language of subsection (F) have some expediting force; and Congress placed a specific, "reasonable" limitation on section 3161(h) (7), the exclusion for "reasonable delay" caused by a defendant's joinder with a co-defendant as to whom time for trial has not run.[5]

Moreover, section 3161(j) contains a number of requirements that the government act promptly when it learns that an individual against whom charges have been brought is in prison pursuant to an earlier conviction. Section 3161(j) directs the government to "promptly" under-

[5] The government asserts that, in analyzing section 3161(h) (7), most courts of appeals have concluded that delay attributable to one defendant applies automatically to all defendants. Surely, the government does not suggest by this statement that the "reasonable" directive should be disregarded. The cases cited by the government do not support such a claim. Indeed, *United States v. Dennis*, 737 F.2d 617, 620-621 (7th Cir. 1984), *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983), and *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983), all made determinations that the delay in question was reasonable. *Cf., United States v. Carey*, 746 F.2d 228 (4th Cir. 1984). See also, *United States v. Novak*, 715 F.2d 810, 814-815 (3rd Cir. 1983), cert. denied, 465 U.S. 1030 (1984); *United States v. Darby*, 744 F.2d 1508, 1518-1519 (11th Cir. 1984).

It is true that appellate courts rarely conclude that delay in this situation is unreasonable. This conclusion, however, only undercuts the government's argument that a reasonable standard would result in a flood of unforeseeable and unavoidable dismissals.

take to obtain the presence of the prisoner and "promptly" file a detainer. § 3161(j) (1) (A) and (B). It also directs the custodian of the prisoner to "promptly" advise the prisoner of the detainer and "promptly" advise the government if the prisoner demands trial. § 3161(j) (2). Upon receipt of notice that the prisoner demands trial, the government must then "promptly" seek to obtain the prisoner's presence for trial. § 3161(j) (3). The courts must enforce these prompt directives, even though they cannot be precisely and predictably quantified.

The government objects not only that it will be difficult to determine when a delay becomes unreasonable, but also that such a determination will be retrospective.[6] (Gov't. Brief 34-35). However, the Act itself plainly anticipated such retrospective determinations. It is difficult to imagine how the conduct prohibited by 18 U.S.C. § 3162 (b) could otherwise be discovered. Moreover, retrospective review will not result in the rash of unforeseeable and unavoidable dismissals that the government predicts.

The government consistently overlooks the fact that mere mistakes in judgment will not result in retrospective findings of non-excludable time. As the Second Circuit recognized in *United States v. Cobb*, 697 F.2d 38, 46, n.8 (2nd Cir. 1982), most motions will follow a reasonably expeditious course and automatically qualify for exclusion under section 3161(h) (1) (F). Problems will arise only where there are extended periods of delay which appear unreasonable, that is, unnecessary, excessive or abusive. Such "unreasonable" delay will ordinarily be apparent.

The government thus needlessly worries that, unless unreasonable delay is tolerated, indeed protected, the

[6] The determination need not always be retrospective. A trial court should determine whether a proposed postponement of a hearing or filing date is reasonable before ever continuing a previously set date.

Speedy Trial Act will become a minefield for the unwary but conscientious prosecutor or judge engaged in thoughtful consideration of a difficult legal or evidentiary issue. It is not these individuals, but those engaged in dilatory tactics, who need the protection of a broad interpretation of the exclusion. The government's insistence on an interpretation designed to benefit such individuals is untenable.

II

SECTION 3161(h)(1)(F) CLEARLY AND UNAMBIGUOUSLY ESTABLISHES THAT THE PRETRIAL MOTION EXCLUSION CONTINUES ONLY THROUGH THE HEARING ON MOTIONS.

Congress could not have stated with any greater clarity that the pretrial motion exclusion ends, at the very latest, at the close of the hearing on motions. Absent a clear indication of legislative intent to the contrary, this statutory language controls its construction. *Ford Motor Credit Co. v. Senance,* 452 U.S. 155, 158, n.3 (1981). The government, nevertheless, argues that petitioners' "proposed" interpretation that this exclusion ends on the date of the hearing is "entirely without support and would play havoc with the statutory structure." (Gov't. Brief 25). Even if the plain language of the statute is disregarded, this assertion is baseless.

Petitioners' interpretation of the exclusion serves the purpose of the Speedy Trial Act by preventing unreasonable post-hearing delay.[7] It also ensures that the parties will know exactly when the pretrial exclusion stops. Although this is a determination that the government elsewhere argues is crucial to efficient administration of the Act, the government's interpretation that the pretrial motion exclusion continues until the parties intend to file no

[7] Reasonable post-hearing delay is excludable through resort to section 3161(h)(8).

further papers, would leave the point of final submission to the intuition of the trial court, a result manifestly at odds with the purposes and objectives of the Speedy Trial Act. For instance, if, as in this case, a trial court fails to set a briefing schedule, the court may mistakenly believe that a responsive pleading is forthcoming, only to learn that the parties did not believe one necessary and that the matter was long ago considered "submitted."

The government cites no legislative history in support of its suggestion that the language of the statute should be rejected. The authority it does present is not persuasive. The cases it cites contain no analysis that would justify rejection of the clear language of the statute. The *Judicial Conference Guidelines,* which advise that the exclusion continues through the filing of any post-hearing submissions, are not binding and cannot be used to controvert legislative intent or statutory language.[8] Moreover, petitioners are not persuaded by the government's argument that Congress' admonition that a hearing be held promptly is intended to expand the exclusion beyond its plain language.

The government makes a final feeble attempt to argue that post-hearing delay is, if nothing else, automatically excludable under the general language of section 3161(h)(1). It defeats its own argument, however, by candidly recognizing that a court cannot do exactly what it suggests, rely upon the general language of the provision to circumvent the specific exclusions set forth therein. (Gov't. Brief 28, n.20).

[8] The Judicial Conference finds support for its interpretation in the Second Circuit Guidelines, which provide that the pretrial motion exclusion continues through the date of oral argument or the due date of any post-argument submission. Congress, however, failed to adopt this broad language, even though, as the government argues, subsection (F) was inspired by the Second Circuit Guidelines.

The language of section 3161(h)(1)(F) clearly means what it says: the exclusion ends at the time of the hearing.

III
THE DELAY IN THIS CASE RESULTED IN A VIOLATION OF THE SPEEDY TRIAL ACT.

This Court is presented with three interpretations of the pretrial motion exclusion. Petitioners have argued that only reasonable delay is excludable pursuant to subsection (F). Petitioners have also argued that even if no reasonable qualification applies, subsection (F) in no event applies to delay occurring after the hearing on pretrial motions has been held. The government argues that all delay, reasonable or not, from the filing of pretrial motions until the motion is taken under advisement by the court is automatically excludable. Regardless of which of these interpretations the Court adopts, a violation of the Speedy Trial Act must be found.

A. The Delay in this Case Was Not Reasonable.

The government reviews the 407-day delay from the filing of petitioner's first pretrial motion to the date on which it concludes that all motions were taken under advisement, and reaches the startling conclusion that the course followed in this case was "entirely reasonable." (Gov't Brief 38). The most cursory review of the record reveals that this is not the case.

1. Pre-hearing delay.

Petitioners' first pretrial motions, filed on November 3, 1980, were scheduled for hearing on November 12, 1980. The hearing did not proceed, however, because the government failed to respond to petitioners' motions. Indeed, the government did nothing until November 19, 1980, when it filed, not a response, but a request for a continuance. The request was granted, and the hearing was continued to November 26, 1980.

Petitioners filed a supplemental memorandum on November 24, 1980. The government had still not filed a response. On November 26, 1980, the court, on its own motion, continued the hearing to January 14, 1981; then, on December 31, 1980, the court continued the hearing to January 28, 1981—a total postponement of more than two months.

When counsel for petitioner Freedman received notice of this latter postponement, set without consultation with the parties, he immediately informed the court of his unavailability on January 28. The court set a new hearing date of February 18, 1981. This new date was scheduled, not because petitioners sought a lengthy postponement, but because the court chose not to hold a hearing before January 28, and February 18 was apparently the first date convenient for the court and parties.

On January 13, 1981, more than one month before the hearing, petitioners filed a motion for disclosure of informant information.

On February 9, 1981, the government filed responsive pleadings to all but one of petitioners' motions. It waited until the day before the scheduled hearing, however, to respond to a motion which had been filed three months earlier. Accordingly, on the date of the hearing, February 18, 1981, petitioners requested an opportunity to consider and reply to the government's delayed responses. A new hearing of March 4, 1981 was scheduled.

Petitioners filed a reply on March 2, 1981, and on March 4, 1981, the date of the hearing, the government filed a supplemental response regarding standing. (Petitioner Henderson had attached a declaration regarding this issue to his November 3, 1980 motion.) The hearing was continued to, and finally held on March 25, 1981.

The record clearly reveals that the court ordered several lengthy postponements, and the government repeatedly and inexplicably delayed in responding to petitioners' motions. In light of this record, petitioners take exception to the government's suggestion that the delay in this case was the result of petitioners' launching of a "vigorous and time-consuming pretrial attack." (Gov't. Brief 44). Despite grumbling references to petitioners' "ensnaring tactics", the government can point to no specific objectionable conduct by the petitioners. We, however, object to the following periods of unreasonable delay caused by the court and prosecution:

— the 7-day period from the scheduled hearing date of November 12, 1980 to the government's belated request of November 19, 1980 for a continuance of the hearing;

— the 49-day postponement of the hearing from November 26, 1980 to January 14, 1981 (even if this delay was due in part to the filing of petitioners' supplemental memorandum, and not just the government's failure to file a response, a 7-week unexplained postponement is clearly excessive);

— the additional, unexplained 14-day postponement of the hearing from January 14 to January 28, 1981;

— the 14-day postponement of the hearing from February 18 to March 4, 1981, based solely on the government's inexcusable delay in filing responses;

— the 21-day postponement of the hearing from March 4 to March 25, 1981 (even if the government's supplemental response filed on March 4

was grounds for a continuance, the 21-day postponement was excessive).

The conclusion that any one of these periods of delay was unreasonable, and therefore not excludable, would result in a violation of the Speedy Trial Act.

2. Post-hearing delay.

The government claims that additional time was necessary to dispose of three matters left unresolved at the March 25 hearing. A review of the three matters clearly establishes that no post-hearing delay attributable to resolution of these issues was reasonable.

(a) *Motion for disclosure of informant information.* The government repeatedly and mistakenly refers to this pleading as a motion, made at the March 25 hearing, for dismissal based on prosecutorial misconduct. (Gov't. Brief 6, 40). In fact, the motion was filed in January, 1981, and requested disclosure of information which petitioners believed might lead to a motion to dismiss. At the hearing, the parties agreed as to how compliance with the request should be accomplished. Delay occasioned by such compliance is not excludable under subsection (F).[9]

(b) *Bell's and Henderson's standing to challenge the search.* The trial court stated that it would not rule upon this issue until it had reviewed already submitted material and requested additional briefing. Since pleadings regard-

---

[9] Congress rejected a proposed amendment to the Speedy Trial Act which would have excluded delay resulting from hearing on pretrial motions "and compliance with orders entered thereon." Proposed Amendments to S. 754, Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, *reprinted in Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 778 and H.R. 4807 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 93d Cong, 2d Sess. 200 (1974).

ing this issue had been on file for quite some time, it is hard to believe that additional review was reasonably necessary. Even so, a reasonable period of time in which to make the request for additional briefing would not have exceeded ten days. Since the court in fact never requested such briefing, it is safe to say that no post-hearing delay can reasonably be attributed to this matter.

(c) *The government's request for additional time in which to present material pertinent to petitioners' request for an evidentiary hearing.* On the day of the March 25 hearing, the prosecutor requested an opportunity to file additional information regarding petitioners' request for an evidentiary hearing.[10] She filed such material on June 25, 1981. The government submits that this delay was reasonable, since the prosecutor had made numerous unsuccessful efforts to obtain the information. However, this overlooks the fact that the prosecutor waited nearly four months before seeking the information. Had she sought the information when the issue was first raised in November, 1980, perhaps she would have been able to obtain it prior even to the date of hearing. Pre-hearing delay in obtaining this information was not reasonable; certainly no post-hearing delay was.

B. The Delay Following the March 25 Hearing on Pretrial Motions Was Not Excludable.

A hearing on pretrial motions was conducted on March 25, 1981. The Speedy Trial Act was next tolled by the filing of a new pleading on September 14, 1981. If the pretrial motion exclusion continues only through the hear-

[10] Contrary to the government's assertion (Gov't. Brief 7), petitioners had not requested at the March hearing that the government obtain this information. The prosecutor simply chose not to seek the information until the hearing.

ing on pretrial motions, the exclusion ended in this case on March 25, 1981. The court then had until April 24, 1981 to rule on motions argued at the March 25 hearing. § 3161 (h)(1)(J). The delay from April 24 through September 14, 1981 was not excludable under any section of the Speedy Trial Act, and that delay resulted in a violation of the Act.

C. All Pending Motions Were Submitted by No Later than July 6, 1981.

On June 25, 1981, the government filed its post-hearing submission in response to petitioners' request for an evidentiary hearing. On July 6, 1981, petitioners replied to that response by letter, informing the court and prosecutor that the post-hearing submission did not obviate the need for the requested evidentiary hearing and pointing out that new evidence supplied an additional ground for such hearing. With the filing of that letter, the trial court had all that it needed and all that it expected in order to rule upon pending motions. The court should have ruled within 30 days on the request for an evidentiary hearing and all previously submitted motions.

The government disputes this point, arguing that petitioners' letter of July 6th raised a significant new evidentiary point which plainly required a response.[11] (Gov't. Brief 41, n.36). Apparently, this was not so plain to the prosecutor who, in fact, never responded to the letter.[12]

[11] This, of course, does not explain why the court did not rule on any of the other motions argued and submitted on March 25, 1981.

[12] When, despite petitioners' request, no evidentiary hearing was scheduled, petitioners filed on September 14, 1981, a formal motion regarding the claim set forth in their letter and renewed their request for an evidentiary hearing. The government finally responded to the motion on November 10, 1981—four months after the issue was first raised.

The court, if it ever expected a response, must have recognized (if not after one month, at least after two) that a response was not forthcoming.

The actions of the parties and the court belie any suggestion that the pretrial motion exclusion applied to any time between July 6, 1981 and September 14, 1981. Accordingly, even under the broad interpretation of subsection (F) urged by the government, the delay in this case resulted in a violation of the Speedy Trial Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DENISE ANTON
Counsel for Petitioner
Scott O. Thornton

PAUL G. SLOAN
Counsel for Petitioner
Thomas J. Henderson

ALEX REISMAN
Counsel for Petitioner
Ruth Freedman

March 1986